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# AMERICAN STATE REPORTS.

## VOLUME 95.

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**NEW YORK.** — (107) **1**; (108) **2**; (109) **4**; (110) **6**; (111) **7**; (112) **8**; (113) **10**; (114) **11**; (115) **12**; (116, 117) **15**; (118, 119) **16**; (120) **17**; (121) **18**; (122) **19**; (123) **20**; (124, 125) **21**; (126) **22**; (127) **24**; (128, 129) **26**; (130, 131) **27**; (132, 133) **28**; (134) **30**; (135) **31**; (136) **32**; (137) **33**; (138) **34**; (139) **36**; (140) **37**; (141) **38**; (142) **40**; (143) **42**; (144) **43**; (145) **45**; (146) **48**; (147) **49**; (148) **51**; (149) **52**; (150) **55**; (151) **56**; (152) **57**; (153) **60**; (154) **61**; (155) **63**; (156) **66**; (157) **68**; (158, 159) **70**; (160) **73**; (161, 162) **76**; (163, 164) **79**; (165) **80**; (166, 167) **82**; (168) **85**; (169, 170) **88**; (171) **89**; (172) **92**; (173) **93**; (174) **95**.

**NORTH CAROLINA.** — (97, 98) **2**; (99, 100) **6**; (101) **9**; (102) **11**; (103) **14**; (104) **17**; (105) **18**; (106) **19**; (107) **22**; (108) **23**; (109) **26**; (110) **28**; (111) **32**; (112) **34**; (113) **37**; (114) **41**; (115) **44**; (116) **47**; (117) **53**; (118) **54**; (119) **56**; (120) **58**; (121) **61**; (122) **65**; (123) **68**; (124) **70**; (125) **74**; (126) **78**; (127) **80**; (128) **83**; (129) **85**; (130) **89**; (131) **92**; (132) **95**.

**NORTH DAKOTA.** — (1) **26**; (2) **33**; (3) **44**; (4) **50**; (5) **57**; (6, 7) **66**; (8) **73**; (9) **81**; (10) **88**; (11) **95**.

**OHIO.** — (45 Ohio St.) **4**; (46 Ohio St.) **15**; (47 Ohio St.) **21**; (48 Ohio St.) **29**; (49 Ohio St.) **34**; (50 Ohio St.) **40**; (51 Ohio St.) **46**; (52 Ohio St.) **49**; (53 Ohio St.) **53**; (54 Ohio St.) **56**; (55, 56 Ohio St.) **60**; (57 Ohio St.) **63**; (58 Ohio St.) **65**; (59 Ohio St.) **69**; (60 Ohio St.) **71**; (61 Ohio St.) **76**; (62 Ohio St.) **78**; (63 Ohio St.) **81**; (64 Ohio St.) **83**; (65 Ohio St.) **87**; (66 Ohio St.) **90**; (67 Ohio St.) **93**.

**OREGON.** — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **28**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**; (29) **54**; (30) **60**; (31) **65**; (32) **67**; (33) **72**; (34) **75**; (35) **76**; (36) **78**; (37) **82**; (38) **84**; (39) **87**; (40) **91**; (41) **93**; (42) **95**.

**PENNSYLVANIA.** — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**; (157 Pa. St.) **37**; (158 Pa. St.) **38**; (159 Pa. St.) **39**; (160 Pa. St.) **40**; (161 Pa. St.) **41**; (162 Pa. St.) **42**; (163 Pa. St.) **43**; (164, 165 Pa. St.) **44**; (166 Pa. St.) **45**; (167 Pa. St.) **46**; (168, 169 Pa. St.) **47**; (170, 171 Pa. St.) **50**; (172, 173 Pa. St.) **51**; (174, 175 Pa. St.) **52**; (176 Pa. St.) **53**; (177 Pa. St.) **55**; (178 Pa. St.) **56**; (179, 180 Pa. St.) **57**; (181 Pa. St.) **59**; (182 Pa. St.) **61**; (183, 184 Pa. St.) **63**; (185 Pa. St.) **64**; (186 Pa. St.) **65**; (187 Pa. St.) **67**; (188 Pa. St.) **68**; (189 Pa. St.) **69**; (190 Pa.

St.) **70**; (191 Pa. St.) **71**; (192 Pa. St.) **73**; (193 Pa. St.) **74**; (194 Pa. St.) **75**; (195 Pa. St.) **78**; (196 Pa. St.) **79**; (197 Pa. St.) **80**; (198 Pa. St.) **82**; (199 Pa. St.) **85**; (195, 200 Pa. St.) **86**; (201 Pa. St.) **88**; (202 Pa. St.) **90**; (203, 204 Pa. St.) **93**.

**RHODE ISLAND.** — (15) **2**; (16) **27**; (17) **33**; (18) **49**; (19) **61**; (20) **78**; (21) **79**; (22) **84**; (23) **91**.

**SOUTH CAROLINA.** — (26) **4**; (27, 28, 29) **13**; (30) **14**; (31, 32) **17**; (33) **26**; (34) **27**; (35) **28**; (36) **31**; (37) **34**; (38) **37**; (39) **39**; (40) **42**; (41) **44**; (42) **46**; (43) **49**; (44) **51**; (45) **55**; (46) **57**; (47) **58**; (48) **59**; (49) **61**; (50) **62**; (51) **64**; (52) **68**; (53) **69**; (54) **71**; (55) **74**; (56, 57) **76**; (58) **79**; (59) **82**; (60, 61) **85**; (62) **89**; (63) **90**; (64) **92**; (65) **95**.

**SOUTH DAKOTA.** — (1) **36**; (2) **39**; (3) **44**; (4) **46**; (5) **49**; (6) **55**; (7) **58**; (8) **59**; (9) **62**; (10) **66**; (11) **74**; (12) **76**; (13) **79**; (14) **86**; (15) **91**.

**TENNESSEE.** — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**; (96) **54**; (97) **56**; (98) **60**; (99) **63**; (100) **66**; (101) **70**; (102) **73**; (103) **76**; (104) **78**; (105) **80**; (106) **82**; (107) **89**; (108) **91**.

**TEXAS.** — (68) **2**; (69, 24 Tex. App.) **5**; (70, 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77, 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr. Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**; (93) **77**; (94) **86**; (95) **93**.

**UTAH.** — (13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20) **77**; (21) **81**; (22) **83**; (23) **90**; (24) **91**; (25) **95**.

**VERMONT.** — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**; (72) **82**; (73) **87**; (74) **93**.

**VIRGINIA.** — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**; (98) **81**; (99) **86**; (100) **93**.

**WASHINGTON.** — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**; (23) **83**; (24) **85**; (25) **87**; (26) **90**; (27) **91**; (28, 29) **92**; (30) **94**.

**WEST VIRGINIA.** — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**; (47) **81**; (48) **86**; (49) **87**; (50) **88**; (51) **90**; (52) **94**.

**WISCONSIN.** — (69, **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**; (104, 105) **76**; (106) **80**; (107, 108) **81**; (109) **83**; (110) **84**; (111) **87**; (112) **88**; (113) **90**; (114) **91**; (115) **95**.

**WYOMING.** — (3) **31**; (4) **62**; (5) **63**; (6) **71**; (7) **75**; (8) **80**; (9) **87**.



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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IDAHO.**

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**BALLENTINE v. WILLEY.**

[3 Idaho, 496, 31 Pac. 994.]

**CONSTITUTIONAL LAW—Statutes Invalid in Part.**—If the purpose of a statute is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient valid portions remain to effect the object without such invalid portions, and if the valid and invalid portions are so mutually connected with and dependent on one another, as conditions, considerations, or compensations, as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not have passed the residue independently, the whole act must be declared void. (p. 20.)

**CONSTITUTIONAL LAW—Apportionment Statute.**—A legislative apportionment act which fails to provide representation for two existing counties and provides representation for two counties having no existence is unconstitutional and void. (p. 21.)

**CONSTITUTIONAL LAW—Apportionment Statutes.**—An apportionment law which seeks to give proper representation to every part of the state must necessarily be an entirety, the one part compensating the other, and the various parts thereof mutually dependent upon one another. Hence, if some of its provisions are void, the whole must fail, unless sufficient remains to carry into effect the object of the statute without the aid of the void parts. (p. 23.)

**CONSTITUTIONAL LAW—Apportionment Statutes.**—The legislature is prohibited from enacting an apportionment law which does not give to the people of one county substantially equal representation to that given each other county in the state, based either upon the entire or voting population or upon some other just and fair basis. (p. 25.)

T. Angel and O. E. Jackson, for the plaintiff.

Wood & Wilson and S. W. Moody, for the defendants.

**498** Per CURIAM. This is an application made by J. M. Ballentine for a writ of mandate to compel the defendants, as  
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the state board of canvassers, to proceed to examine and make a statement of the whole number of votes cast at the election held November 8, 1892, for the office of member of the House of Representatives for Ada county, and make the proper return thereof to the Secretary of State, and to compel the Secretary of State to issue a certificate of election to the plaintiff to the said office of member of the House of Representatives from Ada county. An alternative writ was issued, and on the return thereof the defendants A. J. Pinkham, as Secretary of State, Silas W. Moody, as state auditor, and Frank R. Coffin, as state treasurer, appeared, and demurred to the petition. The defendants Norman B. Willey, as governor, and George H. Roberts, attorney general, appeared, and by answer admitted the allegations of the petition. The case was heard upon the demurrer of defendants Pinkham, Moody, and Coffin.

This case arises out of an act passed by the first legislature of the state of Idaho, entitled, "An act providing for the apportionment <sup>499</sup> of the legislature," approved March 13, 1891: 1st Sess. Laws, p. 195. Said act was passed under and by virtue of the provisions of section 4 of article 3 of the constitution, which section provides as follows: "The members of the legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegate to Congress, and thereafter to be apportioned as may be provided by law; provided, each county shall be entitled to one representative." At the date of the approval of said apportionment act the state of Idaho was composed of eighteen counties, and said act declared the representation that each of said eighteen counties was entitled to. Prior to the approval of said apportionment act, an act was passed organizing the counties of Alta and Lincoln out of the territory theretofore included in the counties of Alturas and Logan, which act was thereafter declared unconstitutional by this court. After the act organizing the counties of Alta and Lincoln had been held unconstitutional, said apportionment act gave representation to two counties that had no existence, viz., Alta and Lincoln, and failed to give representation to two existing counties, viz., Alturas and Logan. The vital question for determination is the validity of said apportionment act, for upon the determination of that question depends partly, if not wholly, the right of the plaintiff to the issuance of the writ of mandate prayed for.

Counsel for plaintiff contend, regardless of the fact that the act creating the counties of Alta and Lincoln had been declared unconstitutional and void, that that part of said apportionment act which provides the representation for all counties except Alta and Lincoln should be held valid, and given effect; and that, as legislative representation for Alturas and Logan counties is not provided for by said act, they are entitled to the representation provided for them by the constitution; while the defendants, Pinkham, Moody and Coffin contend that said act is unconstitutional and void, for the reasons that it provides legislative representation for nonexistent counties; that it fails to give representation to existing counties; and that the intent and object of said act was to <sup>500</sup> accomplish a single purpose only, to wit, that of making an apportionment of the entire state for legislative representation, and that without the void part the act cannot effect such purpose; and cite in support thereof several authorities. Counsel for plaintiff cite in support of their contention, Cooley's Constitutional Limitations, page 209. The author says: "It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional because it is not within the scope of legislative authority. It may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable, object, by means repugnant to the constitution of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just, constitutional exception. It would be inconsistent with all just principles of constitutional law to ad-

judge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional <sup>501</sup> and unconstitutional provisions may even be contained in the same section and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained." This quotation from Cooley's Constitutional Limitations is found in plaintiff's brief, and was dwelt upon with emphasis and energy by counsel for plaintiff in their oral argument to the court. It correctly states the rule of law which governs and should control in the construction of a statute valid in part and void in part. Immediately following the above quotation that distinguished author says: "The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void in one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion; and if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them."



Tested by the rule as laid down by Judge Cooley, should that part of the act in question which fixes the representation of the sixteen counties, therein named, be sustained? Judge Cooley says (Cooley's Constitutional Limitations, sec. 211): "The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of the rule. But, if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless <sup>502</sup> sufficient remains to effect the object without the aid of the invalid portion." The question arises as to what was the intent or purpose of the act under consideration. Was its purpose to provide for the apportionment of but sixteen counties of the state? To ascertain the object of this act we will examine its title, for section 16, article 3 of the constitution provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." Referring to said act, we find that it is entitled "An act providing for the apportionment of the legislature." The title does not indicate that the object of the act was an apportionment of members of the legislature for sixteen counties of the state, but it does indicate that the act is intended as an apportionment for the whole state. Referring to the act itself to ascertain its object, we find that it divides the entire state, as the counties then existed, into senatorial and representative districts, and declares the representation that each of the eighteen counties is entitled to. The clear intent and object of said act was to apportion the entire state for legislative representation, and not for the apportionment of a part of the state only. Can an act having but one object—that of a complete apportionment of the entire state—when part of its provisions have become invalid, and for that reason it fails to apportion the entire state, stand when tested by the rule of law that, if the object of a statute is to accomplish a single purpose only, the whole must fail, unless sufficient remains to accomplish or effect the object of the statute without the aid of the invalid part? We think not. Strike out that portion of said act dividing Alta and Lincoln counties into senatorial and representatives districts, and which declares the representation of each, does sufficient remain to effect or accomplish its object, its purpose? Most certainly not. Counsel for plaintiff concede that after striking out the invalid portion of said act sufficient thereof does not remain to accomplish or effect the purpose intended to be

accomplished or effected by it, to wit, the apportionment of the entire state for legislative representation, but contend that, after striking out the void portion, the act remains valid so far as it goes toward making a complete apportionment of the state; and to make a complete apportionment the counties not mentioned in said act are <sup>503</sup> relegated to the constitution for their representation. They thus admit that the object of the act cannot be effected, with the invalid portions stricken out, without the aid of the constitutional apportionment. Therefore the entire act must be held void when tested by the rule of law that when a statute is intended to accomplish a single purpose only, and some of its provisions are void, the whole must fail, unless sufficient remains to carry into effect the object of the statute without the void part. We consider this rule of law as especially applicable to the case at bar.

In *Slauson v. City of Racine*, 13 Wis. 398, the learned court states the rule as follows: "And the only question left is what effect the invalidity of this provision should have upon the operation of the statute. It is undoubtedly true that parts of a statute may be unconstitutional, and yet other parts, capable of being executed independently, held valid. But the counsel for the plaintiff contend that where parts of a statute are unconstitutional, and other parts valid, the former being evidently designed as compensation for or inducements to the latter, so that the whole, taken together, warrant the belief that the legislature would not have passed the valid parts alone, the whole act should be held inoperative. This position is fully sustained by the case of *Warren v. Charlestown*, 2 Gray, 84, and seems to rest upon solid reasons. We think, also, it is fairly applicable to this case." In *Allen v. Louisiana*, 103 U. S. 80, Chief Justice Waite states the rule applicable to the construction of statutes like the one under consideration as follows: "It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected." "But," as was said by Chief Justice Shaw in *Warren v. Charlestown*, 2 Gray, 84, "if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not



pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them. The point to be determined <sup>504</sup> in all cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible to give effect to what appears to have been the intent of the legislature, if those provisions were struck out." In *Commonwealth v. Potts*, 79 Pa. St. 164, the court says: "The section speaks as an entirety in its purpose, and not in parts, which may be severed without violence to the legislative purpose. Where, as here, the parts are so dependent that one cannot take effect without the other, so as to carry out the legislative intent, we cannot legislate by way of substitution." So in the case at bar the void portion of said act cannot be severed without violence to the legislative purpose or intent. In other words, the legislative purpose of said act cannot be accomplished by carrying into effect the valid portion thereof. In *City of Rochester v. Briggs*, 50 N. Y. 553, the court laid down the rule as follows: "It is a universal rule that, where a part of the statute is unconstitutional, that fact does not authorize the court to declare the remainder void, unless the provisions are so connected in subject matter, meaning, or purpose that it cannot be presumed that the legislature would have passed the one without the other." We think that it would be a very violent presumption to presume that the legislature would have passed said act had they not intended it to provide representation for every county in the state.

The principle announced in the authorities above cited very clearly illustrates the case at bar. We need only to ask the question, Would the legislature have passed the act in question had it not been the intention to effect the one purpose, to wit, to apportion the entire state for legislative representation? Would the legislature have passed an apportionment act leaving out the counties of Alturas and Logan, and, not only leaving them without any representation, but thereby reducing the number of members of the legislature to fifty? That it did not do so, and had no intention of depriving any part of the state of its proper representation, is apparent from the provisions of the act that was passed, and it will scarcely be contended by counsel who seek to uphold this act that the legislature had any such intention. An apportionment law which seeks to give its proper representation to every part of the state must necessarily

505 be an entirety, the one part compensating the other, and the various parts thereof mutually dependent upon each other. In no other way can a just and fair representation be given to every part; and it is the history of such legislation that it requires more skill, and the joint action of more minds, to make a just and fair apportionment of the state, giving to each part proper and just compensations for every other part, than for any other class of legislation. The constitution has, therefore, wisely conferred this power upon the legislature alone. The counsel for plaintiff construe the rule as laid down by the eminent authorities above quoted to mean that, if an act having but one intent, one purpose, contains provisions that are unconstitutional, and that by reason thereof but one-half, or even less, of such intent or purpose can be carried into effect by the valid portion of such act, such valid portion should be given effect. We cannot consent to such a construction. The insurmountable difficulty in the way of holding a portion of this act valid and a portion invalid is apparent. The governor, with a laudable desire to enforce the law, when issuing his election proclamation adopted a portion of the act in question, and, coming to the counties surrounding Alturas and Logan, he found that said act provided one senator for Alta and Custer counties. The governor could not give this senator to Custer and Alturas, because that officer, under the law, would represent a much larger voting population than he would giving the senator to Custer and Alturas, and a larger territory, also, which would have been a new district; but he gave the senator to Custer county, thus giving a senator to a smaller voting population and territory, and thereby creating a new district not created by the constitution or the law, and gave to Custer county one-half a senator more than is given it by said apportionment act or the constitution. A similar condition exists as to other counties. It will thus be seen that said apportionment act, as applied to all counties but Alturas and Logan, cannot be carried into effect. When the supreme court attempts to construe said statute, and apply it to all counties except Alturas and Logan, it is met with the same difficulties that confronted the governor when he came to issue his election proclamation. But neither the governor nor this court has any authority to make a single  
506 new district, or to give any district additional representation, and any such attempt is unconstitutional and void. Had the legislature passed an apportionment act, in which one or

more counties of the state were purposely omitted, and its constitutionality called into question, a very different question from that before us would be presented.

It is contended by counsel for plaintiff that two counties were omitted from the act under consideration, and thereby not given representation, and are therefore entitled to the representation given them by the constitution. The reply is that every county of the state, as they existed at the date of the approval of this act, was named therein, and provided with representation; and it appears that the counties of Alturas and Logan were omitted because of a belief of their nonexistence, and not because of an intention to allow them the representation provided for them by the constitution.

It is further contended that the only constitutional prohibition in regard to the apportionment of the members of the legislature is that each county shall be given one representative, and that, so long as the legislature provides that each county shall have one representative, the remaining members allowed by the constitution are left to the will of the legislature, and it may give them all to a single county, without regard to either the entire or voting population. An act apportioning the members of the legislature in accordance with that view would be a clear violation of the constitution. One of the very foundation principles of our government is that of equal representation, and the legislature is prohibited from enacting an apportionment law which does not give to the people of one county substantially equal representation to that given each other county in the state, based either upon the entire or voting population or upon some other just and fair basis. The reservation of rights by the people is broad enough to prohibit the legislature from passing an apportionment act which is manifestly unequal and unjust to the people of any portion of the state. It has authority to fairly apportion legislative representation, but it is prohibited from disfranchising. Whenever the legislature undertakes to deny the right of the people of any county a just and fair representation in the legislative department of the state, it is not <sup>507</sup> acting within the scope of its authority. The act under consideration shows that the legislature did undertake to make a just and fair apportionment for the entire state for legislation, and failed because of the unconstitutionality of an act creating Alta and Lincoln counties, and for no other reason.

Counsel for plaintiff contend that the law as laid down in the case of *Hampton v. Dilley*, 3 Idaho, 427, 31 Pac. 807 (decided at the present term of this court), is very similar to the case at bar. The distinction between the cases is palpable. In the former case it is held that a person could not be subjected to punishment or deprivation of rights because he obeyed the law as it appeared in the statute, although the statute might be subsequently declared unconstitutional. In the case at bar the apportionment act was to all intents and purposes declared unconstitutional by the decision in the *Alta-Lincoln* case. The plaintiff herein is claiming rights under a law already declared unconstitutional. Because the governor or any other executive officer may have thought the apportionment act was still in force, however honest and sincere they may have been in such belief, is no reason why this court should sustain a statute which the court is satisfied is void. The effort of the governor to reconcile the differences between the apportionment by the statute and that made by the constitution, while perhaps commendable as an effort in behalf of what the executive believed to be the best interests of the state, nevertheless such action on his part of necessity involved the exercise of powers not germane to his office, but expressly prohibited by the constitution.

The plaintiff cites *State v. Van Duyn*, 24 Neb. 586, 39 N. W. 612, as an authority in his behalf. The question in that case was as to the constitutionality of an apportionment act passed in 1887, which failed to give Sarpy county any representation. The question was raised by an application for a writ of mandate to compel Van Duyn, as clerk of Saline county, to post election notices for senators and representatives in Saline county under the apportionment act of 1881, instead of the apportionment act of 1887, upon the ground that the latter act was void, for the reason that said act was not regularly passed by both houses of the legislature as provided by law. It appears that that part of the act which relates to Sarpy county had not passed both  
508 houses of the legislature, and was held null and void. The act was regularly passed as to all counties except Sarpy, but for some reason it was not mentioned in said act as passed by the legislature, but by some means the name "Sarpy county" was inserted into the enrolled bill as signed by the governor. The court says: "The record tends to show that that portion of the act relating to Sarpy county was not passed by both houses of the legislature, perhaps not by either, and submitted to the gov-



ernor, and because of this defect we are asked to declare the whole act unconstitutional." It will be observed that the court was asked to declare said act unconstitutional because the enrolling clerk or some one had inserted a provision concerning Sarpy county into said act, and the court says because of that defect "we are asked to declare the whole act unconstitutional." The court further says: "An act may be void in part and a portion of it valid. In such case the court, if it can separate that portion which is not in conflict with the constitution from that which is clearly in conflict therewith, and the former is complete in itself, and capable of enforcement, it will be sustained." We do not think the learned court states the rule of law applicable to the construction of a statute in part valid and in part invalid, the object of which is to accomplish a single purpose only. The rule as stated in that case falls short of the rule as stated by Mr. Cooley and the other authorities above cited. If the learned court had added: "But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion"—it would have stated the rule applicable to the case at bar. That case, if we rightly apprehend it, did not involve the construction of a statute that was in part valid and in part invalid. An apportionment act had been passed that left out or did not mention Sarpy county, and by some means the provision concerning Sarpy county appeared in the enrolled bill or printed statute. The record showed that that part relating to Sarpy county was no part of the act passed; therefore, that case did not involve the construction of a statute part valid and part invalid, for the reason that the part held to be invalid was not a part of the statute as passed by the legislature. The court holds that the <sup>509</sup> part relating to Sarpy county was no part of said act, and that the act as passed by the legislature was valid. We fail to see any reason for the application of the rule applicable to the construction of statutes in part constitutional and in part unconstitutional. However, if we fail to comprehend the facts as therein stated, and the rule of law applicable thereto, we maintain that, if it was the intention of the legislature to apportion the whole state for legislative representation, and the act, if carried into effect without the void part, failed of its purpose and intent, the whole act should be held void. The court says: "All that the constitution requires is a fair apportionment, the

mode by which it is secured being left to the legislature." This, we think, applies to the case at bar. The legislature undertook to make a fair apportionment of the entire state by the act in question. A part of said act is invalid. The representation given by said act applies to only a part of the state, and is made on a different basis, or gives a different representation, from that given by the constitution. We are confronted with the proposition whether the requirement of the constitution as to a fair apportionment can be secured by an act which was intended as a complete and entire apportionment of the state, where part of such act is void, and certain counties or districts are relegated to the apportionment allowed by the constitution, thus giving the people of certain counties a representation on one basis and the people of certain other counties representation on an entirely different basis. We are of the opinion that a just and fair apportionment cannot be secured in that way. It is the opinion of this court that the peremptory writ should not issue, and that the application therefor be denied, and it is so ordered. Costs in favor of defendants.

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*A Statute may be Valid in Part and void as to the remainder:* State v. Washburn, 167 Mo. 680, 90 Am. St. Rep. 430, 67 S. W. 592; State v. Justus, 85 Minn. 279, 89 Am. St. Rep. 550, 88 N. W. 759; State v. Davis, 130 Ala. 148, 89 Am. St. Rep. 23, 30 South. 344. However, if all the different parts of a statute are so intimately connected with, and dependent upon, one another as to warrant the belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions thus dependent upon one another must fail: *McArdle v. Mayor etc. of Jersey City*, 66 N. J. L. 590, 88 Am. St. Rep. 496, 49 Atl. 1013; *Mathews v. People*, 202 Ill. 389, post, p. 241, 67 N. E. 28.

*The Constitutionality of Legislative Apportionments* is considered in *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, and note.



## EX PARTE COX.

[3 Idaho, 530, 32 Pac. 197.]

**JURISDICTION—Excessive Sentence.**—If a court having jurisdiction of the person of a prisoner, and jurisdiction to try and sentence him for the crime charged, on conviction sentences him to a longer term of imprisonment than the statute authorizes, such judgment or sentence is absolutely void. (p. 31.)

**HABEAS CORPUS—Excessive Sentence.**—If a court does not have authority to render a particular sentence, if such sentence is different from that prescribed by statute, or is below the minimum or above the maximum, it is void and good ground for the release of the prisoner on habeas corpus. (p. 32.)

**HABEAS CORPUS—Excessive Sentence.**—If a prisoner is held under a void and excessive sentence, and the matter is properly brought to the attention of the appellate court, it has authority to inquire into the matter, and to discharge him on habeas corpus. (p. 36.)

**JURISDICTION to Impose the Sentence Pronounced** in a particular case is as essential to the validity of the judgment as is the jurisdiction of the person or the subject matter. (p. 36.)

J. W. Reid, for the petitioner.

G. M. Parsons, attorney general, for the state.

**530** SULLIVAN, J. This is an application for a writ of habeas corpus for the release of John P. Cox, who, it is alleged, is unlawfully imprisoned and restrained of his liberty by John P. Campbell, warden of the Idaho state prison at Boise City, Idaho. It is alleged in the petition that said Cox was indicted at the June term, 1891, and tried at the October term, 1891, of the district court of the second judicial district of the state of Idaho, in and for the county of Idaho, for an assault with intent to commit murder, and that the jury returned the following verdict: "We, the jury in the above-entitled case, find the defendant guilty of an assault with a deadly weapon likely to produce great bodily harm." And the court thereupon entered judgment against and sentenced the prisoner to confinement in **531** the state prison for a term of five years. That said judgment and sentence are void, for the reason that said court had no jurisdiction to impose said sentence and judgment under said verdict. A copy of the indictment, verdict and judgment are made a part of the petition. The court, on the filing of the petition, issued a writ of habeas corpus to the said warden, commanding him to have the body of said John P. Cox before this court at a time therein fixed, and to show cause why the said

prisoner should not be released. At the time fixed said warden made his return to said writ, which shows that the cause of the detention of the said John P. Cox was by virtue of a judgment and sentence of the district court of the second judicial district of Idaho, in and for the county of Idaho, and annexed to and made a part of his return the commitment and judgment of said court, which show substantially the same facts as shown by the petition, the substance of which is above stated.

The prisoner was indicted for the crime of an assault with intent to murder, and was convicted of the crime of an assault with a deadly weapon likely to produce great bodily harm. The punishment for the crime of an assault with intent to commit murder is prescribed by section 6598 of the Revised Statutes, and his imprisonment in the state prison not less than one, and not more than fourteen years, while the punishment for the crime of an assault with a deadly weapon likely to produce great bodily harm is prescribed by section 6732 of the Revised Statutes, and is imprisonment in the state prison not exceeding two years, or by fine not exceeding five thousand dollars or both. The court evidently considered that the prisoner had been convicted of an assault with intent to commit murder, and sentenced him to imprisonment for five years, while in fact the verdict of the jury finds him guilty of the crime of an assault with a deadly weapon likely to produce great bodily harm. Under said section 6732 the maximum imprisonment for the offense of which the prisoner was convicted is two years, and there is no provision of law authorizing a longer term of imprisonment for that crime.

It is conceded by the attorney general that the sentence under the verdict could not exceed two years; but he contends that the prisoner should not be released by writ of habeas corpus, because <sup>532</sup> said judgment is merely erroneous, and not void, and cites some very respectable authority in support of that proposition, to wit: *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20; *Petition of Crandall*, 34 Wis. 177; *In re Williams*, 39 Minn. 172, 39 N. W. 65. The counsel for the prisoner contends that the court had no jurisdiction to sentence the prisoner for a longer term than two years, and that the court exceeded its jurisdiction in rendering said judgment, and that the judgment, for these reasons, is absolutely void. There is no question but what the court had jurisdiction of the prisoner, and had jurisdiction to try him for

the crime of which he was convicted, and to sentence him for that crime; but the question is whether the judgment or sentence which was rendered and pronounced was a mere erroneous exercise of power, and therefore voidable only, or is in excess of, and without, its jurisdiction, and therefore absolutely void. If the sentence is voidable only, the prisoner must be remanded; but, if it is absolutely void, he should be set at liberty. If a court having jurisdiction of the person of a prisoner, and jurisdiction to try and sentence the prisoner for the crime charged, on conviction sentences him to a longer term of imprisonment than the statute authorizes, is such judgment or sentence void, or voidable only? That is the precise question before us. If jurisdiction includes pronouncing the particular judgment authorized by statute, and no other, then the judgment pronounced is absolutely void, for the statute did not authorize such judgment.

19 Central Law Journal, page 102, contains an able article entitled "The Modern Idea of Jurisdiction." The author says: "The idea of jurisdiction entertained by the old jurists appears to have been that jurisdiction is simply the power to decide something in a given controversy, to proceed to judgment, to render some kind of a judgment, and that beyond this everything else related to the propriety of the judgment rendered"; and cites authorities in support thereof. The distinguished author further says: "The modern idea, as distinguished from this, is that jurisdiction is not merely the power to proceed in a cause, and to render some judgment therein, but it is the power to render the particular judgment rendered. This modern idea has been taken up by several respectable courts, including the <sup>533</sup> supreme court of the United States. . . . It will also be perceived that nearly every reported case in which the courts have asserted the power to inquire by habeas corpus whether other courts, in rendering a particular judgment, were cases where the courts so issuing the writs of habeas corpus were courts possessing appellate or superintending jurisdiction over the courts whose judgments were thus inquired into." It is stated in 12 American and English Encyclopedia of Law, page 247, that "there is a very clearly defined attempt in the latest cases in the United States, however, to escape from the position that the judgment of a court having jurisdiction to hear and determine is conclusive by adding to the definition of 'jurisdiction' a new element, viz., that jurisdiction is not merely the

power to hear and determine, but also the power to render the particular judgment which was rendered"; and cites in support thereof cases decided by the supreme court of the United States, and decisions from the courts of last resort of several states. On page 251, *supra*, the following conclusion is reached: "The question, therefore, cannot be said to be definitely decided. The great weight attached to the decisions of the supreme court of the United States makes it at least probable that, if that court continues to hold the views expressed in the late cases cited *supra*, the courts of the various states will sooner or later adopt them; but the decisions thus far scarcely authorize a stronger statement than that there is a tendency in the later cases to hold that jurisdiction includes, not only the power to hear and determine, but also the power to render the particular judgment entered in the particular case." Black on Judgments, section 258, holds that jurisdiction to render the particular sentence imposed is as essential to its validity as the jurisdiction of the person or the subject matter. In commenting on certain decisions which held that if a court had authority to pronounce sentence, and while in the legitimate exercise of its power, committed a manifest error, in the number of years of confinement imposed on the defendant, the sentence was not void, but erroneous, and refused to release the prisoner on habeas corpus, the learned author says: "But the argument is far from satisfactory. It involves the error of overlooking the fact that jurisdiction to render the particular sentence imposed <sup>534</sup> is equally as essential to its validity as the jurisdiction of the person or subject matter. If either of these three elements is wanting, the judgment is a nullity. Now, in respect to the sentence, the court has precisely the jurisdiction which the statute gives it—no more and no less; and if the statute prescribes that the sentence shall be for not less than three years, the court is utterly without power to sentence for one year. This seems too plain for argument. And, indeed, the great preponderance of authority sustains the proposition that if the court did not have the authority to render the particular sentence; if the sentence is different from that prescribed by law, or is below the minimum or above the maximum—that is good ground for releasing the prisoner on habeas corpus." In support of that proposition the author cites: *Ex parte Lange*, 18 Wall. 163; *Ex parte Milligan*, 4 Wall. 131; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Ex parte Bernert*, 62 Cal.



524, 7 Pac. C. L. J. 460; Ex parte Page, 49 Mo. 291; People v. Walters, 15 Abb. N. C. 461; People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; Ex parte Kearney, 55 Cal. 212; In re Petty, 22 Kan. 477; Ex parte Bulger, 60 Cal. 438; Miller v. Snyder, 6 Ind. 1; Ex parte Smith, 2 Nev. 338. In Ex parte Lange, 18 Wall. 163, the point is illustrated in the following clear and forcible manner. The court say: "If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would, for the same reason, be void." In Ex parte Page, 49 Mo. 291, a case, in principle, very similar to the one at bar, the court says: "The statute provides that persons convicted of grand larceny shall be punished as follows: 1. Stealing a horse, mare, gelding, colt, filly, mule, or ass, by imprisonment in the penitentiary not exceeding seven years; 2. In all other cases of grand larceny, by like imprisonment, not exceeding five years: Wagner's Statutes, p. 457, sec. 26. In no case, therefore, does the statute authorize, for any of the offenses which constitute grand larceny, a sentence for more than seven 535 years' imprisonment. Hence the judgment for imprisonment for ten years was in violation of the statute, and palpably illegal. It would have been reversible on writ of error or appeal, as a matter of course. Can this court furnish the required remedy in this proceeding? The general principle is, that on a hearing of a writ of habeas corpus, when it appears that the prisoner is detained by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, no inquiry into the regularity of the proceedings which resulted in the judgment can be had. For all such errors or irregularities the law provides other remedies. . . . But the statute, by an express enactment, declares that when a prisoner is brought up on habeas corpus, if it appears that he is in custody by virtue of process from any court legally constituted, or issued by any officer in the service of judicial proceedings before him, such prisoner can be discharged only in one of the following cases: 1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person. . . . 6. Where the process is not authorized by



any judgment, order or decree, nor by any provision of law: Wagner's Statutes, p. 690, sec. 35. It seems to me that the court, in passing the sentence, exceeded its jurisdiction in the matter, and that it did not act by authority of any provision of law. The application, therefore, I think, comes within the meaning of the statute." The provisions of the statute of Missouri just quoted are substantially the same as the provisions of section 8354 of the Revised Statutes of Idaho, which prescribes the cases in which a prisoner may be released on habeas corpus by this court. The court further says: "But in the case just quoted it will be perceived that the error was one of fact, provable by extrinsic evidence dehors the record. The record, as it stood, warranted the judgment, and the error of fact produced the difficulty. In such a case the court would not, in a collateral proceeding, undertake to revise the judgment. But, in the case we are now considering, the question presented is far different. The error here does not arise out of matter of fact, but is patent on the face of the record. The record proper shows that the judgment of the court in passing sentence was illegal; that it was not simply erroneous or irregular, <sup>536</sup> but absolutely void, as exceeding the jurisdiction of the court, and not being the exercise of an authority prescribed by law."

In the case at bar the statute authorized the court to sentence the prisoner for a term not exceeding two years; but, without any authority whatever, the court sentenced him to a term of five years, and clearly exceeded its jurisdiction in so doing. It has been suggested by the attorney general that, as the court had authority to sentence the prisoner for a term of two years, a writ should be denied, at least until the prisoner had served a term of two years. If the case was before us on appeal the court would no doubt be justified in reversing the judgment, and perhaps in remanding the case for resentencing. We are not aware of any authority that would permit us to reduce said sentence, in this proceeding, to the term of two years, or to remand for a resentencing. We have only authority, in this proceeding, to release or remand the prisoner to custody, as said judgment is an entirety. We certainly cannot, in this proceeding, modify it in any manner. In *Ex parte Kelly*, 65 Cal. 154, 3 Pac. 673, a case in which the defendant was convicted of battery, and sentenced or adjudged to pay a fine of six hundred and fifty dollars, or to be imprisoned in the

county jail until the fine was paid, at the rate of one day's imprisonment for every dollar of fine, and that he perform labor on streets or public works during such imprisonment, an application for a writ of habeas corpus was made, and the court say: "Battery is a misdemeanor, and is punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both. . . . It was clearly the intent to impose a penalty of a fine, and, in case it was not paid, imprisonment until the fine was satisfied at the rate indicated in the judgment. This is justified by section 1446 of the Penal Code. . . . But this statute nowhere allows any addition to this substituted mode of payment. We look in vain to find any authority in any tribunal, in the Penal Code or any other codes, to annex to this substitution of incarceration for coin any other punishment. We find no power in the justice to add, as is done by the judgment, that the defendant, while so imprisoned, perform labor on the streets or other public works in the city of Los Angeles. This portion of the <sup>537</sup> judgment is clearly beyond and outside the jurisdiction of the tribunal which rendered it. Now, the judgment is a unit, and, if one portion of it is without the jurisdiction of the justice, the judgment is void." So, in the case at bar, the judgment is a unit, an entirety; and we cannot, in this proceeding, reduce it to two years: See, also, *Ex parte Bernert*, 62 Cal. 524. In *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, the court say: "A party held only by virtue of judgments thus pronounced, and therefore void for want of jurisdiction, or by reason of the excess of jurisdiction, is not put to his writ of error, but may be released by habeas corpus. It will not answer to say that a court having power to give a particular judgment can give any judgment, and that a judgment not authorized by law, and contrary to law, is merely voidable, and not void, and must be corrected by error. This would be trifling with the law, the liberty of the citizen, and the protection thrown about his person by the bill of rights and the constitution, and creating a judicial despotism. It would be to defeat justice, nullify the writ of habeas corpus by the merest technicality, and the most artificial process of reasoning. . . . No court is or can be competent to pronounce a sentence and give judgment in open and palpable violation of a positive statute, and a judgment thus given is void. With us, all punish-

ments are prescribed by statute, as well as to character as extent; and a sentence not conformable to law, as not warranted by statute, or which is in excess of the legal punishment, is ultra vires, and like every other act, whether judicial or ministerial, done without legal authority, is void." The opinion of the court in that case is a very able and exhaustive one, and we think peculiarly applicable to the case at bar. In *Ex parte Reed*, 100 U. S. 13, the court say: "If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void." The sentence in the case at bar was not warranted by statute, was in excess of the punishment prescribed by law, and is absolutely void; and when a prisoner <sup>538</sup> is held under such a sentence, and the matter is properly brought to the attention of this court, it has authority to inquire into the matter, and to discharge the prisoner, if it be found that the court had no jurisdiction, under the law, to render the particular judgment rendered, or to pass the sentence imposed. In *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152, in regard to this class of cases, the court say: "It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of habeas corpus into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court had jurisdiction of the party, and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further." In the case at bar the court did exceed its powers in the sentence, which it pronounced. There was no provision of law authorizing such sentence, and it is void. We are of the opinion that jurisdiction to render the particular sentence imposed was as essential to the validity of the judgment as the jurisdiction of the person or subject matter, and that the sentence of the district court under which the said John P. Cox is held a prisoner was pronounced without authority of law, and is void, and that the prisoner should be released; and it is so ordered.

Huston, C. J., and Morgan, J., concur.

*Jurisdiction Includes* not only the power to hear and determine, but also the power to render the particular judgment in the particular case: *Russell v. Shurtleff*, 28 Colo. 414, 89 Am. St. Rep. 216, 65 Pac. 27; monographic note to *Koepke v. Hill*, 87 Am. St. Rep. 173.

*Habeas Corpus* to release a prisoner because of an excessive sentence is considered in the monographic note to *Koepke v. Hill*, 87 Am. St. Rep. 194, 195.

*The Validity of Sentences* differing from those authorized by law is considered in the monographic note to *State v. Klock*, 55 Am. St. Rep. 264-274.

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## COFFIN v. BRADBURY.

[3 Idaho, 770, 35 Pac. 715.]

**APPELLATE PRACTICE—Review of Errors.**—The appeal of either party brings up only the errors alleged to have been committed against himself. (p. 39.)

**STATUTE OF FRAUDS.—Receipt and Acceptance** of property sold under an executory contract of sale, at any time after making the contract, takes it out of the statute of frauds. (p. 40.)

**STATUTE OF FRAUDS.—If Questions of Delivery and Acceptance** of goods sold to take the sale out of the operation of the statute of frauds are submitted to the jury under proper instructions, the verdict will not be disturbed when there is a conflict of evidence. (p. 40.)

**STATUTE OF FRAUDS.—Delivery and Acceptance of Goods Sold.**—If, from the entire evidence, different minds might differ honestly as to the delivery and acceptance of goods sold to take the sale out of the statute of frauds, the question of such acceptance is one of fact for the jury, and their verdict thereon will not be disturbed. (p. 40.)

**EVIDENCE—Res Gestae—Declarations.**—Time is not necessarily a controlling element or principle in the matter of *res gestae*, and declarations made under circumstances to warrant the court in presuming that they grew out of the litigated issue and illustrate the true character of the transaction, and were dependent upon it, were not designedly made or devised, for a self-serving purpose, are evidentiary facts, and not within the rule applicable to hearsay evidence. Such declarations are admissible, although not made at the exact time of the occurrence of the principal fact in issue. (pp. 49, 50.)

**PARTNERSHIP—Evidence.**—If an attempt to establish a partnership wholly fails through lack of evidence, the court commits no error in holding as matter of law that no partnership exists. (p. 51.)

**EVIDENCE to Explain Writing.**—If a writing is introduced in evidence as an admission, and not as part of the contract between the parties, it is always admissible for the person who wrote it, and against whom it is introduced, to explain the meaning he intended to convey. (p. 51.)

**APPELLATE PRACTICE.—Exceptions not Saved** in the court below cannot be considered on appeal. (p. 52.)



**EVIDENCE.**—**Statements and Admissions Made by a Party to the Suit** may be proved without first calling his attention to them, or laying any foundation for impeachment. (p. 52.)

**APPELLATE PRACTICE**—**Trial Verdict.**—If all material issues are submitted to the jury and instructions not excepted to by the appellants, neither the verdict nor the order overruling a motion for a new trial will be disturbed on appeal, on the ground of the insufficiency of the evidence, if there is substantial conflict therein. (p. 52.)

S. L. Tipton and T. Angel, for the appellants.

G. H. Stewart and W. E. Borah, for the respondents.

**776 SULLIVAN, J.** This action was brought to recover the value of five New Era ditchers, alleged to have been sold to, and received and accepted by, appellants, who were defendants in the court below. The answer is a general denial of the allegations of the complaint. The action was tried by the court, with a jury, and a verdict rendered in favor of respondents for the sum of six thousand and fifty-two dollars and ninety-one cents, together with interest amounting to sixteen hundred and fifty-nine dollars and twenty-one cents, on which verdict judgment was duly entered against appellants. A motion for a new trial was interposed and overruled by the court. This appeal is from the order denying the motion for a new trial and from the judgment.

Respondents contend that the errors alleged to have occurred on the trial were not properly saved and preserved so as to authorize this court to consider them on this appeal. Their contention is, that under the provisions of section 4426 of the Revised Statutes of 1887, each exception taken on the trial must be settled at the time the decision is made (other than those deemed excepted to by the provisions of section 4427 of the Revised Statutes), unless a different time is agreed upon by the parties; that no exceptions were settled during the trial and no time agreed upon by the parties for their settlement. The record contains a stipulation, in which it is agreed that at the trial of this case, in April, 1892, which resulted in a disagreement of the jury, the following entry was made in the minutes of the court, to wit: "The parties here stipulated that they might prepare a bill of exceptions after trial," and upon this stipulation the appellants rely and contend that it remained in force and effect at the trial that resulted in the judgment from which this appeal was taken; while respondents contend that said stipulation applied to the trial then in progress, and



no other, and applied to a settlement of a bill of exceptions under the provisions of section 4430 of the Revised Statutes of 1887, and not to exceptions taken on the trial. This contention <sup>777</sup> was denied by the trial court, and no exception taken thereto, and no appeal has been taken therefrom.

The plaintiff cannot have errors alleged to have been committed against himself reviewed on defendant's appeal. The appeal of either party brings up only the errors alleged to have been committed against himself. If the respondent, in an appeal, desires to have errors against himself corrected, he must present them to this court, on his own appeal: *Jones v. St. John Irr. Co.*, 2 Idaho, 58, 3 Pac. 1. The first error specified is the insufficiency of the evidence to justify the verdict. Under this specification of error the question of the validity of the contract sued on, when tested by the statute of frauds, is raised. It is contended that as the value of the property sued for is shown to have exceeded two hundred dollars, the contract, or some memorandum thereof, must be in writing and subscribed by the party charged, or by his agent, unless the buyer accepted and received a part of said property, or paid at the time of the bargain some part of the purchase price. That as none of those requirements were complied with, said contract comes within the provisions of section 6009 of the Revised Statutes of 1887.

The provisions of said section claimed to be applicable to this case are as follows: "In the following cases the agreement is invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party charged or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents: . . . Subd. 4. An agreement for the sale of goods, chattels or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money."

It is sufficient, under this section of the statute, if the chattels, goods or things in action are delivered to and accepted by the purchaser, at any time after the contract of purchase is made. But unless the provisions of said section above quoted are complied with, the seller could not, at any time after the contract was made, deliver the goods and compel an acceptance

of them. However, if the goods are received and accepted by <sup>778</sup> the purchaser, the contract is then taken out of the statute of frauds, and may be enforced against the buyer for the purchase price.

It is alleged in the complaint that said ditchers were sold to appellants on the fourteenth day of March, 1890, and that thereafter they accepted and received the same. It is not claimed by respondents that they aver or prove a delivery and acceptance at the time the contract of sale was entered into, or that the contract, or some note or memorandum thereof, was in writing, signed by appellants or by their agent, or that any part of the purchase money was paid at the time the contract was entered into. It is the receipt and acceptance of the machines, some fifteen days after the contract of purchase was made, that respondents rely upon as taking this contract out of the provisions of said section, and we think with reason. If a contract of sale is made, and the property subsequently received and accepted by the purchaser, it is then too late to escape liability thereon, because of the provisions of said section. Had the purchaser refused to receive and accept the property, and suit been brought to enforce the contract, said statute would have been a complete defense to such action, but after the receipt and acceptance of the property, the virtue of said section, as a defense to an action to recover the purchase price is gone. This section of the statute of frauds only relates to executory contracts, and not to executed ones. Receipt and acceptance of the property sold, at any time after making the contract, takes the contract out of the statute of frauds: *Hinkle v. Fisher*, 104 Ind. 84, 3 N. E. 624; *King v. Jarmon*, 35 Ark. 190, 37 Am. Rep. 11; *Cartan v. David*, 18 Nev. 311, 4 Pac. 61; *Dodge v. Crandall*, 30 N. Y. 294; *Brown v. Farmers' Loan etc. Co.*, 117 N. Y. 266, 22 N. E. 952.

The second contention is that said ditchers were not delivered to or received and accepted by appellants. The evidence of respondents show that at the time said ditchers were ordered J. M. Bray informed Sherman M. Coffin that a man by the name of Jessop was going to use the ditchers in the construction of a certain ditch which appellants were constructing under the supervision of J. M. Bray. It also shows that <sup>779</sup> when the ditching machines arrived at Nampa, Jessop appeared and assisted in setting them up ready for use; that he took possession of them and took them out upon the aforesaid

ditch, and went to work thereon with them; that while taking them out on the ditch he met Mr. Bray; that he used them on said ditch under the immediate supervision of Mr. Bray for two months, at least. It was conceded on the trial that the ditchers were delivered to Jessop, who was a subcontractor of appellants, and the question of acceptance does not appear to have attained special prominence during the trial of the case. Upon a careful review of the entire evidence, I think it tends to show that the ditchers were purchased for the use of Jessop, and that he received and accepted them, and that his receipt and acceptance was the receipt and acceptance of Bradbury and Bray, and bound them.

The questions of sale and delivery were submitted to the jury upon an instruction by the court at the request of appellants, whereby the jury was instructed that to entitle the plaintiffs to recover they must establish by a preponderance of evidence the sale and delivery of the ditchers to the defendants, and by their verdict they found those points in favor of respondents. When from the entire evidence different minds might honestly reach a different conclusion, as to the acceptance of the property sold, the question of acceptance is one of fact for the jury, and their verdict thereon will not be disturbed. Nor will the order of the court denying a motion for a new trial be reversed when the aforesaid conditions exist: See note to *Shindler v. Houston*, 49 Am. Dec. 316; *Gray v. Davis*, 10 N. Y. 291; *Baker on Sales*, sec. 382a; *Theilen v. Rath*, 80 Wis. 263, 50 N. W. 183; *Galvin v. Mackenzie*, 21 Or. 184, 27 Pac. 1039; *Garfield v. Paris*, 96 U. S. 557; *Hinchman v. Lincoln*, 124 U. S. 39, 8 Sup. Ct. Rep. 369.

Considerable authority is cited on the question as to what acts constitute an acceptance under said section 6009. The correctness of the rule established by the authorities cited is not questioned. The case of *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316, is cited as a case in point. It was held in that case that delivery and acceptance of goods, such as will <sup>780</sup> take it out of the statute of frauds, cannot be shown by mere words; some acts transferring possession are necessary. That case is not in point, for the reason that it is not claimed nor shown that the transfer of the possession of said machines was made by mere words; but that the machines were set up and possession of them given; that respondents parted with possession and thereafter exercised no rights of possession or

ownership over them; that the person for whose use they were intended took them and put them to the very use for which they were purchased. The case of *Hinchman v. Lincoln*, 124 U. S. 38, 8 Sup. Ct. Rep. 369, is cited as a case very similar to the one at bar. That is a case where the facts, in relation to the contract of sale alleged to have been within the statute of frauds, were admitted. There was no dispute as to the facts on which appellant relied, showing, as he claimed, sale, delivery and acceptance. The court held that as there was no dispute as to the facts, it belonged to the court to determine their legal effect. It was also held that to take an alleged contract of sale out of the operation of the statute of frauds, there must be acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, and that when anything remained to be done by the seller to perfect the delivery, such fact would be generally conclusive that there was no receipt by the buyer. This case is very different from the one under consideration. The facts of sale, delivery and acceptance were in dispute, and nothing is shown which would indicate that anything remained to be done by the sellers to perfect the delivery of said machines.

It is earnestly contended by appellants, and with apparent confidence, that all of the evidence taken together shows that the sale of said ditching machines was made by Stearns to Jessop a day or two before Sherman Coffin met Bray at Nampa. It is claimed that Stearns testified that he sold said machines to Jessop. Mr. Stearns, as a witness for appellants, on direct examination, did testify that he sold four ditchers to Jessop

He afterward testified as follows, to wit: "Q. Why did you telephone for Coffin to come up? A. Because I wanted him to sell those ditchers, so that I could make a little money. That <sup>781</sup> is what I did it for." Further on he testified as follows: "Q. And you assisted Coffin all the way through the negotiations? A. No, I don't think I did all the way. Q. Did you hear anything, or all that was said, on that day in relation to the sale of those ditchers to Jessop? A. I don't know whether I did or not. The sale was not consummated in my presence. Q. Then the sale was not consummated until Sherman Coffin came up? A. No, sir. It might have been at that time, but I don't remember. Q. And Jessop was in Utah? A. Jessop was in Utah." This evidence needs no comment. It is too plain to be misconstrued or misunderstood. It clearly



shows that no contract or bargain for the sale of the machines was made between Jessop and Stearns, and that if any bargain was made it was made between Coffin and Bray, at a time when Jessop was in Utah.

Sherman Coffin testified that no sale was made until he met Bray at Nampa, in response to a dispatch from Stearns. He also testified that he never met Jessop until the ditchers arrived at Nampa. That John M. Bray was the man who gave the order for the ditchers and who agreed to pay for them, as a member of the firm of Bradbury & Bray. This was denied by Mr. Bray. He denied that he made any contract for the purchase of said machines, and denied that he had any authority from Jessop to purchase said machines. He testified as follows, to wit: "I says, 'No, sir, Mr. Coffin, I will have nothing to do with those machines whatever. I have no authority to buy machines for Jessop.'" This evidence shows that Bray did not purchase them for Jessop.

Mr. Bray also testified to a conversation alleged to have been had with Frank R. Coffin, about the middle of May, 1890, in which he stated to Coffin that he had nothing to do with the machines whatever, "That the entire sale of those machines was between Sherman Coffin, Stearns and Jessop."

The testimony of Stearns shows that he had a conversation with Jessop in regard to ditching machines in the presence of J. M. Bray a day or two before Sherman Coffin met Bray. That thereafter Jessop left Nampa for Utah, and Stearns telephoned Coffin to come to Nampa, and on his arrival introduced <sup>782</sup> him to J. M. Bray as the man who could talk with him about those ditchers, and the evidence shows that they did talk about ditchers. It may be true, as testified by Mr. Bray, that he then and there informed Sherman Coffin that he would have nothing to do with the machines whatever, and that he had no authority to purchase machines for Jessop, but regardless of those statements, the testimony tends to show he did have some conversation about them, and authorized Sherman Coffin to have them shipped in the name of Bradbury & Bray, and afterward requested Coffin to not have them shipped in said firm's name.

Coffin testified that the contract was made with Bray. Stearns' testimony is to the same effect. Bray testified that it was made between Stearns, Coffin and Jessop, and from this conflicting evidence and other evidence the jury found against appellants.



The testimony of Charles Stewart tends to corroborate the testimony of Sherman M. Coffin. He testified as follows: "I rode up to Bray, who was out on the ditch where Jessop's contract was. I rode up to Bray and I think he wasn't using very good language toward Jessop, because Jessop was getting behind. He says, 'I am in the soup with Coffin Brothers for those damned ditchers.'" This testimony is not contradicted.

D. H. Birdsall, a witness for respondents, testified that he met Bray at Nampa between May 27 and 30, 1890, and had some conversation with him about selling him Safety Nitre Powder, and he informed Bray that Coffin Brothers were agents for said powder, and would supply Bray with said powder. Bray thereupon informed Birdsall that he had some difficulty with Coffin Brothers, and did not care to deal with them. After some further conversation Birdsall informed Bray that he was going to Caldwell to see Sherman M. Coffin, and Bray thereupon requested him to say to Coffin that he (Bray) did not wish to have any trouble with him (Sherman M. Coffin), and that he would see that they (Coffin Brothers) were paid for the ditchers. This testimony is contradicted by Bray. Birdsall and Stewart were disinterested witnesses, and the jury no doubt gave some weight to their testimony, as corroborating <sup>783</sup> that of Sherman M. Coffin, but it is urged by appellants that if said statements were made by Bray, they would be perfectly consistent with the theory that Bradbury & Bray were only guarantors, and not purchasers. There might be some point in this contention if J. M. Bray admitted that he was simply guarantor, but he denies that they were guarantors, and there is no evidence tending to show that they were, except that contained in the letter written by Sherman M. Coffin to J. M. Bray, dated May 24, 1890.

If the defense in this suit had been that appellants were guarantors, and not liable because such guaranty was not in writing, then the contention of appellant would be of some weight; but as that is denied, and the issue was as to whether the appellants were original purchasers, the evidence of Stewart and Birdsall tends to corroborate the testimony of respondents on that issue. The issue as to whether Bradbury & Bray were simply guarantors is not in this case. It would appear that said statements were made by Bray to Stewart and Birdsall, not upon the theory that Bradbury & Bray were guarantors, but upon the theory that they were purchasers.

C. W. Moore's testimony also corroborates Sherman M. Coffin as to the sale. He testified that he had no knowledge of the sale of any goods at the time a certain telegram was sent, except the ditchers to Bradbury & Bray. By what means the witness became possessed of that knowledge the record fails to disclose. The testimony of Sherman M. Coffin and Mr. Bray is so unsatisfactory and conflicting in substantial matters that it is impossible for this court to say how much of said testimony is true and how much is false, and as the jury are the exclusive judges of the weight to be given to the testimony of any witness or witnesses, and they having found on the purchase, delivery and acceptance of the machines, this court, under the conditions, would not be justified in disturbing the verdict.

Appellants contend that the court erred in permitting Sherman M. Coffin and Frank R. Coffin to testify in regard to a certain telephone message sent by the former to the latter, inquiring as to the responsibility of appellants. The evidence <sup>784</sup> shows that on the day the ditchers in controversy were ordered, Sherman M. Coffin waited at Nampa for a reply to a telegram sent to Jessop until late in the day. That he finally informed Mr. Bray that he must return to his home, at Caldwell, some nine or ten miles from Nampa; that thereupon Bray requested him to order five ditchers, and stated that if Jessop could not use the fifth ditcher that Bradbury & Bray would use it themselves. That witness got his team and drove to his home at Caldwell, and put his team out, and immediately thereafter, and before ordering said machines from Chicago, he telephoned his partner, Frank R. Coffin, at Boise City, and asked him if Bradbury & Bray were good for five ditchers at eleven hundred dollars each, and requested him to find out and let him know. That this all occurred within two hours after he left Nampa. This telephone communication and Frank R. Coffin's testimony in regard to receiving the same was objected to, and the admission thereof is assigned as error. It is urged that the same is no part of the *res gestae*, that it took place after the agreement for the sale of the ditchers had been entered into, and was a communication from one of the plaintiffs to his partner, and not in the presence of the defendants or either of them. That said testimony is self-serving and too remote to be a part of the *res gestae*.

Counsel for appellants contend that the rule applicable to this class of testimony is that such declarations, to become com-

petent evidence, as part of the *res gestae*, must accompany the act which they are supposed to characterize, and must so harmonize with it as to be obviously a part of the same transaction, and in support of this rule cite *Moore v. Meachman*, 10 N. Y. 207; *Enos v. Tuttle*, 3 Conn. 250; *Cherry v. Butler*, 17 S. W. 1090; *Tisch v. Utz*, 142 Pa. St. 186, 21 Atl. 808; *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880; 1 *Wharton on Evidence*, sec. 265; 2 *Wharton on Evidence*, sec. 1174; *Dawson v. Pogue*, 18 Or. 94, 22 Pac. 640; *State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074; *People v. Dewey*, 2 Idaho, 83, 6 Pac. 103, 5 *West Coast Rep.* 812; *Binns v. State*, 57 Ind. 46, 26 *Am. Rep.* 48.

<sup>785</sup> In *Moore v. Meachman*, 10 N. Y. 207, the court, in passing upon the question of the admission of certain declarations, said: "The general rule is that declarations to become a part of the *res gestae* must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction," and held that the general rule applicable to the admission of such declarations as a part of the *res gestae* was the rule which should govern in that case. *Enos v. Tuttle*, 3 Conn. 250, was a case where a plaintiff undertook to introduce declarations of an absconding debtor as evidence against a garnishee, and the court held that such declarations were not evidence for the plaintiff. *Cherry v. Butler*, 17 S. W. 1090, held the declarations of payee on draft narrating the fact that he had twice paid it were self-serving, and error to admit them.

In *Tisch v. Utz*, 142 Pa. St. 186, 21 Atl. 808, it was held that declarations of a judgment debtor were not admissible in evidence for the purpose of impeaching the judgment. In *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880, it is held that: "Declarations of a party, to be admissible as a part of the *res gestae*, must be contemporaneous with, or at least so connected with the main fact in issue as to constitute one transaction." *Dawson v. Pogue*, 18 Or. 94, 22 Pac. 640, holds: "Ordinarily, acts and declarations of parties to an action are not competent evidence in their behalf. There are, however, exceptions to the rule." *State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074, holds: "It is impossible to tie down to time the rule as to declarations; we must judge from all the circumstances of the case; we need not go to the length of saying that a declaration made a month after the fact would of itself be admissible, but if, as in the present case, there are connecting circumstances,

it may, even at that time, form part of the whole *res gestae*, and that the declaration was simply a narration of past events or occurrences and was incompetent."

In 1 Wharton on Evidence, section 265, it is held that such declarations are inadmissible if made so far prior to the act sought to be characterized as to give opportunity for their correction in way of preparation, or if made so long afterward as to leave an interval—which interval should not be measured <sup>786</sup> by time but by the circumstances of the case—in which excuses, explanations or aggravations could be got up. 2 Wharton on Evidence, section 1174, is applicable to the admission of agents in matters of tort, and not in point. *Binns v. State*, 56 Ind. 46, 26 Am. Rep. 48, holds that: "A declaration which is simply a narrative of past events . . . is admissible in evidence."

The authorities cited state the general rule applicable to the admission of declarations made by a party, as evidence in his own behalf, and some of them recognize that there are exceptions to the general rule. In some of them time is considered a controlling element and in others not. They hold that such declarations, to become competent evidence for the party making them, must be a part of the *res gestae* or at least so considered. The term "*res gestae*" is used in one class of cases to indicate the very matter in issue, the ultimate thing itself, the thing controverted, and in others the term is used to indicate the surrounding facts of a transaction, which explain or characterize the main fact.

In 1 Greenleaf on Evidence, section 108, it is held that the surrounding circumstances constituting parts of the *res gestae* may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion. Whether declarations made after the occurrence of the litigated issue should be admitted as evidence in behalf of the party making them rests in the sound judicial discretion of the court: *O'Connor v. Chicago etc. Ry. Co.*, 27 Minn. 173, 38 Am. Rep. 288, 6 N. W. 481; *State v. Ah Loi*, 5 Nev. 99; 1 Greenleaf on Evidence, sec. 108.

In 1 Taylor on Evidence, sections 525, 526, it is stated that: "In all these cases the principal points of attention are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form in conjunction



with it one continuous transaction. It was at one time thought necessary that they should be contemporaneous with it; but this doctrine has of late years been rejected, and <sup>787</sup> it seems now to be decided that, although concurrence of time must always be considered as material evidence to show the connection it is by no means essential."

In *Insurance Co. v. Mosley*, 8 Wall. 397, which was an action on an accident insurance policy, the declaration of the deceased as to the cause of the injury from which he died made shortly after the injury was held competent evidence and a part of the *res gestae*. The court, speaking through Mr. Justice Swayne, in regard to certain declarations being part of the *res gestae* says: "To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate. But this rule is by no means of universal application"; and quotes with approval from *Rawson v. Haig*, 2 Bing. 99, as follows: "It is impossible to tie down to time the rule as to such declarations. We must judge from all the circumstances of the case. We need not go to the length of saying that a declaration made a month after the fact would, of itself, be admissible; but if, as in the present case, there are connecting circumstances it may, even at that time, form a part of the whole *res gestae*."

Referring to the doctrine applicable to the admission of such declarations, the court says: "The tendency of recent adjudications is to extend, rather than to narrow, the scope of the doctrine. Rightly guarded in its application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority."

In *Board of Education v. Keenan*, 55 Cal. 642, Justice McKee, in delivering the opinion of the court, said: "Wharton defines '*res gestae*' as those circumstances which are the undersigned incidents of a particular litigated act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of anyone concerned, whether participant or bystander; they may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense that they are part of the immediate preparations for, or emanations of, such act and are not produced by the calculated policy of the actors."

<sup>788</sup> In *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49, and note, it is held that: "Declarations, to be a part of the *res gestae*,



are not required to be precisely concurrent in point of time with the principal fact, if they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous, and admissible": See, also, *State v. Horan*, 32 Minn. 394, 50 Am. Rep. 583; *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838; *New England Ins. Co. v. De Wolf*, 8 Pick. 56; *State v. Jones*, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; *State v. Ah Loi*, 5 Nev. 99; *Ross v. Bank of Burlington*, 1 Aik. 43, 15 Am. Dec. 664.

In *Milne v. Loisler*, 7 Hurl. & N. 786, it was held competent for the plaintiff, for the purpose of proving upon whose credit goods sued for were sold, to introduce in evidence a certain letter written by plaintiff to his agent, requesting him to inquire as to the financial standing of the defendant, of a person to whom the person receiving the goods had referred him for that purpose. The plaintiff stated in said letter that the defendant was the purchaser of said goods. And it was further held that the jury might look at the whole letter, and although in itself it was not evidence of the truth of the facts stated, it might be considered as corroborative of plaintiff's version of the transaction: 1 Greenleaf on Evidence, Redfield's ed., sec. 108a.

In Bouvier's Law Dictionary (edition of 1888), under the head of "*res gestae*," the following statement occurs: "In the United States the tendency is to extend, rather than narrow, the scope of the doctrine of *res gestae*. Although, generally, the declarations must be contemporaneous with the event sought to be proved, yet, where there are connecting circumstances, they may, even when made some time afterward, form a part of the *res gestae*: *Insurance Co. v. Mosley*, 8 Wall. 397; *Railroad Co. v. Coyle*, 55 Pa. St. 402; *Harriman v. Stowe*, 57 Mo. 93; *Brownell v. Railroad Co.*, 47 Mo. 239; *Commonwealth v. Eastman*, 1 Cush. 181. And in England the decision of Cockburn, C. J., in *Bedingfield's Case*, 14 Cox C. C. 341, is <sup>789</sup> directly contrary, holding that the declarations must be contemporaneous with the event, to be admissible. This decision has been vigorously opposed by Mr. Taylor and others: See 14 Am. Law. Rev. 817, 15 Am. Law. Rev. 1-71; *Field v. State*, 57 Miss. 474, 34 Am. Rep. 479."

From a review of the authorities I think the decided weight is that time is not necessarily a controlling element or principle

in the matter of *res gestae*, and that declarations made under circumstances to warrant the court in presuming that they grew out of the litigated issue and illustrate the true character of the transaction and were dependent upon it, were not designedly made or devised for a self-serving purpose, are evidentiary facts and are not within the general rule applicable to hearsay testimony. Such declarations are admissible although not made at the exact time of the occurrence of the principal fact in issue.

I think the evidence referred to comes within the rule laid down in many of the authorities above cited. The declaration or communication was not a narrative of past events or of the contract of sale. It was an inquiry which any prudent business man would naturally make before he would feel safe in ordering upward of six thousand dollars worth of machinery for a customer whose financial condition was not known to him. He would very naturally want to know the ability of the purchaser to pay. It is true the order for the ditchers had been given and received some two hours before the inquiry under consideration was made, but it was made before the ditchers were ordered, and as I view it was made in the midst of the transaction and before all of the conditions were performed, which were required to be performed before the contract became binding upon either party. It was a pertinent inquiry, and I think it one of the reasonable emanations arising out of the contract of purchase and dependent upon it; that it was not deliberately devised or contrived by the parties for a self-serving purpose; that it was spontaneously and not designedly made, and tends to explain to whom the credit was given. Its truth or falsity was for the jury.

790 The question litigated was whether the ditchers were sold to Bradbury & Bray and on their credit. Bray testified that they were sold to Jessop and he alone became liable for the payment of the purchase price, while Sherman M. Coffin testified that they were sold to Bradbury & Bray and on their credit. I think the testimony under consideration tends to show to whom the credit was given and was properly admitted.

Error is alleged because the court held that under the evidence no partnership for the sale of said machines existed between Stearns and Sherman M. Coffin. Appellants undertook to show that there was a partnership between Stearns and Coffin in the sale of said ditchers. Stearns and Coffin both testify that no such partnership existed; and there is not a

scintilla of evidence tending to show a partnership. That being true, it was not prejudicial error for the court to so hold.

The fourth error assigned is that the court erred in admitting the testimony of Sherman M. Coffin in explanation of the sense in which he used the word "guaranty" in his letter of May 24, 1890, to John M. Bray. The letter was introduced as an admission of said respondent to show that at the time of writing it he considered Bradbury & Bray as guarantors, and not as original purchasers.

Under this contention appellants cite several authorities upon the proposition that when the language of a written contract is neither ambiguous nor technical, parol evidence is not received to explain it. These authorities are not in point, for the reason that said letter is not a written contract nor a part of one. I understand the rule to be that when a writing is introduced as an admission, and not as a part of the contract between the parties, it is always permissible for the party who wrote it, and against whom it was introduced to explain the meaning that he intended to convey. The rule applicable to oral admissions is the proper one to be applied to the evidence under consideration: *Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575; *Smith v. Crego*, 54 Hun, 22, 7 N. Y. Supp. 86; *Bingham v. Bernard*, 36 Minn. 114, 30 N. W. 404; *Auzerais v. Nagle*, 74 Cal. 60, 15 Pac. 371; *Browne on Parol Evidence*, 791 sec. 6; *Morris v. St. Paul etc. R. R. Co.*, 21 Minn. 91; *Burke v. Ray*, 40 Minn. 34, 41 N. W. 240.

The fifth error assigned is the refusal of the court to strike out that portion of Sherman M. Coffin's testimony in explanation of the word "guaranty," to wit: "We have dozens of entries in our books, at this time, which could show that fact." We cannot consider this objection for the reason that no exception appears to have been saved in the court below.

The sixth error assigned is that the court erred in permitting Charles Stewart, a witness on behalf of plaintiff, to testify as follows: "I rode up to Bray, who was out on the ditch where Jessop's contract was. I rode up to Bray, and think he wasn't using very good language toward Jessop, because Jessop was getting behind. He says, 'I am in the soup with Coffin Brothers for those damned ditchers.'"

Appellants contend: 1. That if this evidence was introduced for the purpose of establishing plaintiff's case as an admission of the contract sued on, it should have been introduced as a part of the testimony in chief, and not in rebuttal: 2. If it

was introduced to impeach Bray, it was error to admit it, for the reason that Bray's attention was not called to it when he was on the witness-stand. The first objection does not appear to have been taken in the court below, and cannot be considered for that reason. The second is not well taken, for the reason that statements and admissions made by a party to a suit may be proved without first calling the party's attention to them. The rule that the attention of the witness must be called to the statement made, and the time and place of making the same, in order to lay the proper foundation for impeachment, does not apply to this case: 1 Thompson on Trials, sec. 497; Collins v. Mack, 31 Ark. 685, 694; Lucces v. Flinn, 35 Iowa, 9.

After a careful review of all the evidence I find a substantial conflict on the material issues, and where the material issues are submitted to the jury on instructions of the court, not excepted to by appellants, the verdict of the jury will not be disturbed by the appellate court, nor will the order overruling a motion for a new trial be reversed on the ground of insufficiency <sup>792</sup> of the evidence to justify the verdict when there is a substantial conflict in the evidence: Ainslie v. Idaho World Printing Co., 1 Idaho, 641; Dubrutz v. Jessup, 54 Cal. 118; Campe v. Meierdiercks, 87 Cal. 290, 24 Pac. 419; Lynch v. Welby, 87 Cal. 441, 25 Pac. 548; Garrard v. White, 12 Ky. Law Rep. 656, 14 S. W. 966; Ketcham v. Barbour, 102 Ind. 576, 26 N. E. 127.

I find no reversible error in the record. The judgment of the court below is affirmed with costs of this appeal in favor of respondents.

Morgan, J., concurs in the affirmance of the judgment.

Huston, C. J., took no part in the hearing or decision of this case.

MORGAN, J. I concur in the affirmance of the judgment, but disagree with the opinion in regard to the admission of the telephone message of Sherman Coffin to his partner, Frank Coffin, which was as follows: "I asked him [Frank Coffin] if Bradbury & Bray were good for five ditchers at eleven hundred dollars each, or for five thousand five hundred dollars." This was one and a half hours after his conversation with Bray, and after he had driven home, a distance of nine miles. It is precisely like a private conversation between the partners, at home,



to determine whether it would be safe as a business venture to order the ditchers. I do not think it a part of the *res gestae*, and think it should have been excluded. I do not deem it necessary now to give the reasons for my opinion. It is evident, however, that it could have had no weight with the jury. It was an inquiry that would be equally as applicable, if Sherman Coffin considered Bradbury & Bray guarantors or purchasers, or if he expected to get their names as sureties on a note signed by Jessop. It proved nothing and tended to prove nothing, and therefore was not prejudicial error.

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*The Statute of Frauds* has no application to executed, but only to executory contracts: *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39, 23 South. 994, 26 South. 974. Compare *Weeks v. Crie*, 94 Me. 458, 80 Am. St. Rep. 410, 48 Atl. 107. To take a contract of sale out of the statute, the receipt and acceptance of the goods need not be contemporaneous with the contract. They may be subsequent thereto and yet be effectual: See the monographic note to *Shindler v. Houston*, 49 Am. Dec. 330. The existence of a delivery sufficient to take a sale out of the statute is a question of fact for the jury: *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178.

To Make Declarations a Part of the *Res Gestae*, they must be contemporaneous with the main fact, though they need not be precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are to be regarded as contemporaneous: See the monographic note to *People v. Vernon*, 95 Am. Dec. 57-60; *Campbell v. State*, 133 Ala. 81, 91 Am. St. Rep. 17, 31 South. 802; *Elder v. State*, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220, and cases cited in the cross-reference note thereto.

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## IN RE COUNTIES ELMORE, LOGAN AND BINGHAM v. COUNTY OF ALTURAS.

[4 Idaho, 145, 37 Pac. 349.]

### MUNICIPAL CORPORATIONS—Limitation of Actions.—

Municipal corporations, in all matters involving mere private rights, as contradistinguished from public rights, strictly so called, are subject to limitation laws to the same extent as private individuals, but on the other hand, in all matters involving strictly public rights, they are not subject to the limitation laws as such. (p. 55.)

### OFFICERS—PUBLIC DUTY—Action to Enforce—Demand.—

If a municipal duty is of a strictly public nature required by law to be performed by a public officer, no demand for its performance is necessary before action brought to compel performance. The law itself is a continual demand, and neglect of performance a continual refusal. (p. 58.)

**MUNICIPAL CORPORATIONS—Public Duty—Statute of Limitations.**—Upon the division of a county by statute containing



a provision that boards of commissioners for the newly created counties shall apportion an existing debt and ascertain what portion thereof each county shall pay, the duty thus imposed is a perpetual continuing public duty incumbent upon the commissioners then in office and their successors against which the statute of limitations does not run, and the right to compel the performance of such duty by action does not abate by reason of the commissioners then holding office refusing or neglecting to perform such duty during their term. (p. 59.)

Johnson & Johnson and S. B. Kingsbury, for the petitioner.

R. F. Buller and F. E. Ensign, for the respondent.

<sup>150</sup> MORGAN, J. We will first examine the claim that the action is barred by the statute of limitations. We are referred to Wood on Limitations, section 53, wherein he states that the maxim, "Nullum tempus occurrit regi," only applies in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign, although their powers, in a limited sense, are governmental, and refers in support thereof to County of St. Charles v. Powell, 22 Mo. 525, 66 Am. Dec. 637. This was a case where a county attempted to recover from an individual money due the county on bond for money loaned, and it was held that limitation had run against the county. In Baker v. Johnson Co., 33 Iowa, 151 (also referred to), the case was on claim of a private individual against the county for money, and it was held that the statute run in favor of the county. In Evans v. Erie Co., 66 Pa. St. 22, the county sought to recover possession <sup>151</sup> of a tract of land which had been in possession of a private individual for thirty-three years, and it was held that the statute run against the county. Of the same character are the other cases referred to by counsel for respondent. They are cases where it was sought by a county to recover a private right from an individual, or (vice versa) an individual sought to recover a private right from a municipality, and are not similar to the case at bar.

The following causes and principles show distinctions that must be drawn: It is a principle of the common law that the government—and therefore, by parity of reasoning, a county—cannot be guilty of laches. It is also well settled that a state is not barred by a statute of limitations, unless expressly named: Madison Co. v. Bartlett, 1 Seam. 70; State Bank v. Brown, 1 Seam. 107. Agents of the county are not acting for themselves, but for the county, and therefore the county is not barred by

their neglect: *State Bank v. Brown*, 1 Scam. 70. As respects public rights or property held for public use upon trusts, municipal corporations are not within the operation of the statute of limitations; but with regard to mere private rights or contracts the rule is different, and such corporations may plead, and have pleaded against them, the statutes of limitations: *Logan Co. v. City of Lincoln*, 81 Ill. 156-159; *County of Piatt v. Goodell*, 97 Ill. 90, et seq. In the latter case, quoting from Dillon: "Municipal corporations as we have seen, have a double character—the one public, the other private. As respects property not held for public use, as streets, commons, etc., and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within the limitation statutes, and be affected by them. It will perhaps be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted as against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes." In Wait's *Actions and Defenses*, volume 7, page 234, the author says: "The privilege of the maxim '*Nullum tempus occurrit regi*,' does not apply to any of the subdivisions of a state, such as counties, cities, or other municipal corporations." "This <sup>152</sup> statement, in its application to municipal corporations, must we think, be confined to cases involving mere private rights, and it should be accepted with this limitation." says Mr. Justice Mulkey in above case of *County of Piatt v. Goodell*, 97 Ill. 90. The court states the general doctrine and the better opinion "to be that municipal corporations, in all matters involving mere private rights, as contradistinguished from 'public rights,' strictly so called, are subject to limitation laws to the same extent as private individuals. On the other hand, in all matters involving strictly public rights, they are not subject to the limitation laws, as such." But in the latter class of cases the courts occasionally, under special circumstances which would make it highly inequitable or oppressive to enforce such public rights, interpose by holding the municipality estopped from doing so.

In the case at bar the legislature (15th Sess. Laws, sec. 7, p. 35) commands the county commissioners of each of the four counties of Alturas, Elmore, Logan, and Bingham, at their

regular meeting in April, 1889, respectively, to appoint such a competent accountant, who shall meet at the town of Hailey, and proceed to audit and ascertain the amount of indebtedness to be paid by each of the aforesad counties to Alturas county, etc., specifying particularly the duties of these auditors, when so appointed. The appointment of these accountants is a public duty to be performed by the commissioners of each of these counties. It is due to the people of these counties that this appointment should be made. There is a large indebtedness, estimated variously at two hundred and ninety thousand dollars to three hundred and twenty-five thousand dollars, which was due from Alturas county to various parties at the time of the division of the county, February 7, 1889. This large amount is drawing interest. This interest is accumulating, and is much of it past due. The counties are each required to levy a tax each year for the payment of this interest. They cannot do this without knowing the proportion of indebtedness each is to pay. This they cannot know without an apportionment. Each county is interested in knowing its share at the earliest practicable date. In this proceeding we have nothing to do with the basis of this appointment. It is the clear duty of this court to put in motion the machinery necessary to bring about an apportionment of the debt. The question as to the correctness of the apportionment or of the legality of the proceedings in making <sup>153</sup> it, is not before the court; and it is apparent that the court has no facts before it now upon which to act, further than to require an apportionment. It is apparent, also, from an inspection of the sections of the law involved in this division of the indebtedness, to wit, section 3605 of the Revised Statutes and section 7 of the division act (15 Sess. Laws, p. 35), that the legislature intended that each of the counties should bear a portion of the indebtedness in proportion to the amount of taxable property each received from Alturas county as it existed in the year 1888, except as to bonds issued for the erection of court-houses and other public buildings, concerning which a different provision is made; and necessarily some testimony must be taken, in order to ascertain what amount of taxable property went to each. No evidence is before this court in this regard, and therefore no intimation is given or intended, in this opinion, as to the burden each county should take. The appointment of these accountants is a public duty devolving upon the several counties, as pointed out in the law, and a public duty in the performance of which all the people are vitally interested; and it

is a public duty of a public right, in the sense spoken of by the court in the cases of *Logan County v. City of Lincoln*, 81 Ill. 156, and *County of Piatt v. Goodell*, 97 Ill. 90; and such matters, involving strictly public rights, as distinguished from private rights and duties, are not subject to the limitation laws, as such.

It is contended that sections 4060 and 4061 of the Revised Statutes of Idaho make the statute of limitations applicable to the state and to the counties thereof, and to actions of the character of the one at bar. Section 4060 states: "An action for relief not hereinbefore provided for must be commenced," etc. It will be noticed that all the sections preceding section 4060 apply to actions by or against private individuals for the enforcement of a private right or correction of a private wrong, and therefore we must conclude that section 4060 refers to actions of the same character which have not been specially enumerated in the other sections. It would seem to be clear that, if actions of a public nature to enforce the performance of a public duty or obligation were intended to be included in this section, the legislature would have said so, as this would include actions of an entirely different nature from those specified in the other sections of the chapter, and, if so construed, <sup>154</sup> would include a large class of cases of which nothing is said in the limitation statutes, and which are clearly not barred by lapse of time. We cannot thus undertake to extend the statute, by construction, beyond what the legislature seem to us evidently to have intended. The same is true with reference to section 4061. The state, in the enforcement of a right against private individuals, would not ordinarily be barred, and not at all unless specially named; and therefore section 4061 says (as amended): "The limitations prescribed in this title apply to actions brought in the name of the state, or for the benefit of the state." This section is specifically restricted to the limitations "prescribed in this title"; that is, to actions of a private nature, and against private individuals. To hold that it applied to actions such as the one at bar would seem to be extending the limitation beyond either the words or meaning of the statute, and therefore beyond the intention of the legislature. If the court did this in this case, where a public duty is involved and required, why may the court not be called upon to extend the statute to other duties and rights of a public nature, which are not included, and not intended to be included, in the statute of limitations? *People v. Melone*, 73 Cal. 574,



15 Pac. 294. It is true, in certain cases, courts have held and do hold that the limitation laws take effect, when called upon after long lapse of time, when the enforcement of the duty or right, on account of changed conditions, would work great injustice; but in the case at bar great injustice must result from longer postponement of the duty enjoined by the statute, as interest is accumulating which must eventually be paid by the counties liable therefor. Under the said seventh section of the law dividing Alturas county, the appointment of these accountants by the commissioners of the respective counties, and the making of this apportionment, is a continuing duty and obligation until it is performed.

As to demand and refusal, there is the same distinction between public and private rights and duties. In the latter case, demand on the part of the party entitled to have the duty performed, and a refusal or neglect on the part of the party who is under obligation to perform the duty must be made; but when the duty to be performed is strictly of a public nature, as when it is done by a public officer or officers, there is no one specially **155** empowered to make the demand for its performance, and there is no necessity for demand and refusal: *State v. County Judge*, 7 Iowa, 186; *Short's Information*, sec. 249. In such case the law imposing the duty is a continual demand, and neglect of performance a continual refusal: *Short's Information*, sec. 249; *Beach on Public Corporations*, 1599, note; 2 *Spelling's Extraordinary Relief*, sec. 1381.

We have been referred to *United States v. Boutwell*, 17 Wall. 604, as a case sustaining the contention of the respondents that the cause of action was and could be against the county commissioners of Alturas county in office in 1889 only, and that right of action abated with the expiration of their then present term of office. This case is explained in *Commissioners v. Sellew*, 99 U. S. 626; also, in *Thompson v. United States*, 103 U. S. 483, 484. This action is not in any sense a personal action. It is an action against the county and the commissioners of a county, as officers and not as persons; and the cause of action does not abate by any set of officers going out of office, as it is a continuing duty, devolving upon the commissioners as such. So the right of action continues until the duty is performed. It is a perpetual duty, devolving upon the commissioners of 1889, and their successors, until it is performed.



It is our opinion that the said commissioners should, without unnecessary delay, proceed to appoint accountants, as directed by section 7, whose duty it will be to meet with other accountants of the counties named, and apportion the indebtedness of Alturas county, as it existed at the time of the division of the county. A peremptory writ is ordered to issue, commanding and requiring the boards of county commissioners of Alturas, Elmore, Logan, and Bingham counties, respectively, to appoint accountants in accordance with section 7 of an act entitled "An act creating the counties of Elmore and Logan" (15 Sess. Laws, p. 35), without delay, whose duties shall be to apportion the said indebtedness of Alturas county, as it existed at the time of said division, to wit. February 7, 1889, between the said above-named counties.

Huston, C. J., and Sullivan, J., concur.

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*The Statute of Limitations* runs against municipal corporations, such as cities, towns, and counties, except as to property devoted to a public use, or held upon a public trust, and contracts and rights of a public nature: *Bedford v. Willard*, 133 Ind. 562, 36 Am. St. Rep. 563, 33 N. E. 368; *Mobile Transportation Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143, 30 South. 645; *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867; monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-495.

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## WILLMAN v. FRIEDMAN.

[4 Idaho, 209, 38 Pac. 937.]

**ACTIONS—Appearance.**—A party who appears generally by demurrer is estopped to subsequently question want of the service of process upon him. (p. 61.)

**ATTACHMENT—Cross-Complaint.**—Damages Claimed by Reason of Wrongful Attachment are proper matter for cross-complaint in the original action. (p. 62.)

A. F. Montandon and J. J. Burt, for the appellant.

T. Angel, A. Brown and P. M. Bruner, for the respondent.

**212** HUSTON, C. J. This action was originally commenced by the plaintiff to recover certain sums of money alleged to be due to him from the defendant, and evidenced by certain instruments in writing. On filing his complaint, plaintiff caused an attachment to be issued and served upon defendant, who was at the time engaged in the business of general merchandising in the town of Hailey, Alturas county, Idaho. De-

fendant moved the district judge for the dissolution of the attachment, upon the ground that it was wrongfully issued, which motion was allowed by the district court; and from this action of the district court an appeal was taken to this court, when the action of the lower court was affirmed, and the cause remanded for further proceedings: See *Willman v. Friedman*, 3 Idaho, 737, 35 Pac. 37. Thereupon the defendant filed his answer to the complaint of the plaintiff in the district court, and at the same time filed a cross-complaint, setting up, by way of counterclaim, the wrongful issuance of the attachment aforesaid, and alleging damages by reason thereof, and asking affirmative relief therefor. Upon the filing of defendant's answer and counterclaim, plaintiff made application by petition to this court for a writ of prohibition forbidding the district court from receiving or entertaining said cross-complaint in said action, which petition was denied by this court: See *Willman v. District Court*, 4 Idaho, 11, 35 Pac. 692. Thereupon said cause came on for trial before said district court, with a jury, which trial resulted in a verdict and judgment in favor of defendant, from which judgment this appeal is taken.

Plaintiff filed demurrer to the cross-complaint of defendant, which was overruled by the court. Thereupon plaintiff moved to strike out the cross-complaint of defendant, which motion was refused by the court, and thereupon plaintiff filed his answer to defendant's cross-complaint. There is no assignment or specification of errors in the record or in the brief of counsel other than appears in the bill of exceptions. The contention of appellant would seem to be that the district court erred in overruling plaintiff's demurrer to the cross-complaint of defendant, and also in refusing plaintiff's motion to strike out said complaint. It is also contended by plaintiff that there was no personal service of the cross-complaint upon the plaintiff.

**213** Section 4188 of the Revised Statutes of Idaho provides as follows: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint." Plaintiff commenced his action by filing complaint, and at the same

time issuing attachment. Before answer or demurrer by defendant, the latter moved to dissolve the attachment, upon the ground that it was wrongfully issued and served, and this motion was sustained and allowed. Thereafter defendant filed his answer to plaintiff's complaint, and at the same time filed his cross-complaint, asking affirmative relief in damages alleged to have been sustained by him by reason of the wrongful issue of said attachment. The answer and cross-complaint were duly served upon the attorney of the plaintiff, who had appeared in the action, and said attorney filed his demurrer to the answer and cross-complaint, and motion to strike out said cross-complaint. The filing of the demurrer was, if any further appearance was necessary, an appearance by the plaintiff so far as the cross-complaint was concerned: Idaho Rev. Stats., sec. 4892. It is true plaintiff assumes when he files his "answer to the so-called cross-complaint," as he terms it, to make a special appearance, but he had already appeared generally by filing his demurrer to and motion to strike out the cross-complaint. The court, having acquired jurisdiction of the parties and the subject matter, will proceed to determine all questions involved. "The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights": Rev. Stats., sec. 4113. The purpose of the code is not only to simplify proceedings, but to avoid, as far as may be, a multiplicity of suits.

The appellant has cited various authorities in support of his contention that the cross-complaint filed in this action did not state a cause of action proper to be set up in the cross-complaint, and it is upon this question that the whole case depends. This <sup>214</sup> question is one which depends largely, if not entirely, upon statute; and, before any decision can be said to be strictly in point, it must appear that it was made under a statute similar to our own. In *Conner v. Winton*, 7 Ind. 523, cited by appellant, A brought action against B to recover a sum of money deposited by A with B, which B refused to deliver on demand. B alleged, by way of counterclaim, that A had falsely charged him with stealing the money deposited, whereby he had sustained damages, etc. It was held no counterclaim; but the court, in its opinion in that case, makes a clear distinction between it and a case like the one at bar. In *State Bank v. Morris*, 13 Iowa, 136, the court held that the defendant in an attachment suit may, by way of counterclaim or cross-demand,

recover in the principal action for damages sustained by reason of the wrongful suing out of the writ. In *Reed v. Chubb*, 9 Iowa, 178, the court held that "where, however, the affidavit for attachment and the bond are filed, and the writ sued out, at the commencement of the action, if the writ is wrongfully sued out, any damages sustained by the defendant therefrom constitute a 'claim held by him at the commencement of the suit,' in such a sense that the same may be set off against the plaintiff's demand in the same action. He need not wait until the principal suit is determined, before bringing suit on the attachment bond." To the same effect is the case of *Stadler v. Parmlee*, 10 Iowa, 23, also, cited by appellant. The case of *Waugenheim v. Graham*, 39 Cal. 169, is, we think directly in point, and in that case the court holds unequivocally, upon a statute almost identical with that of Idaho, that the damages claimed by reason of the wrongful issuance of an attachment are proper matter for cross-complaint in the original action. We are unable to discover any merit in the exceedingly fine distinction insisted upon by counsel for appellant between the cases we have quoted and the case at bar. The cause of action set forth in the cross-complaint arose out of the transaction which forms the basis of appellant's action, and was, under our statutes, entirely proper to be so presented to the court, in that form. The judgment of the district court is affirmed, with costs.

Morgan and Sullivan, JJ., concur.

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*As to What may be the Subject of a counterclaim, setoff, or recoupment, see the monographic notes to Gregg v. James, 12 Am. Dec. 152-157; Van Epps v. Harrison, 40 Am. Dec. 320-337; Woodruff v. Garner, 89 Am. Dec. 482-492; St. Paul etc. Trust Co. v. Leek, 47 Am. St. Rep. 578-595. A setoff for damages from a wrongful attachment has been allowed the defendant against the plaintiff's action: See the monographic note to Burton v. Knapp, 81 Am. Dec. 475.*



## CREER v. CACHE VALLEY CANAL COMPANY.

[4 Idaho, 280, 38 Pac. 653.]

**MECHANICS' LIENS on Distinct Branch of Property.**—A detached portion of a structure may be sold under execution to enforce a mechanic's lien. (p. 64.)

**MECHANICS' LIENS on Distinct Branch of Canal.**—A person constructing or performing labor in the construction of a distinct branch of a main canal under a contract with the owner is entitled to a lien on such branch for the amount due him for such labor. (p. 65.)

R. H. Whipple, for the appellant.

Stewart & Dietrich, for the respondents.

**283** MORGAN, J. This appeal exhibits a most extraordinary state of facts. It is stipulated that the defendants owe the plaintiffs the sum demanded in their complaint, with interest thereon. It further appears from the record that quite a large part of the property upon which this lien is claimed, and upon which the said James Thompson claims to have a mortgage, which he wishes the court to declare to be a prior lien to that of the plaintiffs, had no existence whatever when this said mortgage was given. That the plaintiffs constructed the whole of the north and south branches of said canal after this mortgage was given, except about four and one-half miles, which they had constructed before. The plaintiffs actually created this property which made the mortgage of the said Thompson, who is the appellant in this case, good; that is, the north and south branches of the canal were not built—had no existence—when the mortgage was given. That they were built by said plaintiffs, for which construction **284** they have not been paid, except in part. And this suit is brought to secure the balance of the money that the defendants acknowledge is due plaintiffs for said work; and this court is asked to assist in preventing the plaintiffs securing their pay, on technical objections, that are themselves without foundation. This appeal has no merit whatever.

The first assignment of error is that the court erred in holding that the notice of lien filed by plaintiffs, and made a part of the complaint, is insufficient, under the statutes of Idaho. We have carefully examined the notice of lien, and think it is entirely sufficient under the laws of this state. The notice states that the Cache Valley Canal Company is the name of



the owner, and is the reputed owner, of said premises, which were before described, and caused the said canals to be constructed and excavated. And this substantially states the contract by the terms of which the canal was constructed. This disposes of the first and second citations of error.

As to the third citation of error, the court below does not hold that the notice filed by plaintiffs charges or claims a lien upon land or right of way, and the notice does not so claim or charge, nor does the statute require that it should so charge or claim. Section 5130 of the Revised Statutes of Idaho sets forth what the notice must contain. This, among other things, requires the notice to contain a description of the property to be charged with the lien, and the statute gives the lien (section 5125); and section 5128 extends the lien to so much of the land around the structure as may be necessary for the convenient use and occupation thereof.

The fourth specification is that the court erred in holding that the canal and right of way could or can be sold separate from the franchise, etc. The court below did not so hold.

The attorney for the appellants<sup>\*</sup> practically abandoned all his specifications of error, except the seventh, which is that the court erred in holding that a detached portion or part of a structure can be sold under execution to enforce a mechanic's lien. In other words, the appellants claim that if the plaintiffs had asked a lien upon the whole system of canals they **285** might have obtained it, complaining that the plaintiffs did not ask of the court all they were entitled to and therefore they should not have a lien upon any part of the canal. The appellants demand that the case should be reversed because the plaintiffs did not claim all they should have. The appellants can hardly be heard in such a complaint. But is the position itself tenable? The north and south branches of the Cache Valley Company's canal are, as appears by the record, separate and distinct pieces of property—each a number of miles in length, partly supplied with water from reservoirs, and partly from the main canal above them. The contract was made by the company with the plaintiffs to construct these branches separate and apart from the main canal—the north branch wholly, and all of the south branch except about four and one-half miles, which had been constructed before this contract was made. They are distinct pieces of property, although a part of the system of canals belonging to this company. All

the work for which plaintiffs claim this lien was done on these branches, and under a contract to construct these branches, which does not mention the main canal. This had been theretofore constructed. We think this lien can be obtained upon this part of the system. The Cache Valley Canal Company, in its answer, alleges that the plaintiffs agreed to build and construct two certain branches or ditches, calls them "canals or ditches" throughout the answer, and gives no notice that it owns or did own any other canal. No other property than that described in the notice is hinted at in the answer. The defendants themselves considered them independent pieces of property, as appears by the contract for their construction, and the answer to the complaint. But, if not entirely independent, this lien would attach to the property constructed by these plaintiffs, and it is so held in *Hill v. La Crosse etc. R. R. Co.*, 11 Wis. 225: *Phillips on Mechanics' Liens*, sec. 182. 'These branches do not become part of the system until fully constructed, and the lien thereon for the work done discharged. A careful examination of the cases cited by both counsel for the defendants and for plaintiffs will disclose the fact that where a mechanic has <sup>286</sup> asked for a lien upon the entire property for work upon a part, his claim has been allowed, and where he asked for a lien upon a distinct part that has been also allowed. In either case the law has been construed liberally in favor of the party asking the lien.

These are all the specifications deemed necessary to notice. Judgment of the court below is affirmed, with costs awarded to respondents.

Huston, C. J., and Sullivan, J., concur.

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*The Question Involved in the Principal Case* is considered in *Pacific Rolling Mill Co. v. Bear Valley Irr. Co.*, 120 Cal. 94, 59 Pac. 136, 65 Am. St. Rep. 158, and monographic note thereto.

Am. St. Rep., Vol. 95—5

SIMMONS HARDWARE COMPANY v. ALTURAS COMMERCIAL COMPANY. STANDARD OIL COMPANY v. ALTURAS COMMERCIAL COMPANY.

[4 Idaho, 334, 39 Pac. 550.]

**ATTACHMENT—Sufficiency of Affidavit.**—If the statute has not in terms made the signing of an affidavit in attachment a necessary incident to its validity, the absence of the signature of the affiant does not invalidate it, especially when it appears therefrom that he was duly sworn before a proper officer at the time of making the affidavit. (p. 69.)

**ATTACHMENT—Sufficiency of Undertaking.**—If the words in an undertaking in attachment are not sufficiently explicit, or, if literally construed, would be nonsense, the bond must be construed with reference to the intention of the parties, and in doing this it is allowable to depart from the letter of the condition, to reject insensible words, and to supply obvious omissions in order to uphold the bond. (p. 70.)

**ATTACHMENT—Construction of Undertaking.**—If an undertaking in attachment shows a conclusive purpose and intention to indemnify the defendant, the omission or insertion of unimportant words, or mere clerical errors, will not vitiate it. (p. 70.)

F. E. Ensign, for the appellant.

S. B. Kingsbury and Johnson & Johnson, for the respondents.

336 HUSTON, J. These cases, resting as they do upon similar facts, and involving the application of the same principles of law, were heard together, and will be so considered by the court. The appeal is from orders of the district court denying applications for the discharge of certain writs of attachment sued out by the plaintiffs and levied upon property of defendant. The record contains the papers upon which the motions were made, consisting of the affidavits for attachment and the undertakings in each case, the motions, and the order of the court thereon. We will consider the questions raised by the record in the order in which they were presented upon the hearing.

337 It is contended by appellant that the affidavit of attachment in the case of Simmons Hardware Co. v. Alturas Commercial Co. is void for the reason that it affirmatively appears therefrom that at the time the same was made the plaintiff had received from the defendant, and still held, as collateral security for the debt sued for, a pledge of personal property. Said affidavit, after the usual statements required by the statute, contains the following statement: "That after said contract was

made, and said claim became payable to the plaintiff, the defendant sent to the plaintiff, as collateral security for said claim, a certain account purporting to be an account against a firm known as 'Holland & Short,' and that defendant agreed to forward in place of said claim a note of said firm of Holland & Short. That defendant has not forwarded to the plaintiff a note of said firm of Holland & Short, but instead thereof forwarded what purported to be a note signed by one W. A. Holland and J. B. Short as individuals, and that said note was taken by the defendant from the said individuals, Holland and Short, in pursuance of an agreement made between the said defendant and the said firm of Holland & Short, and that said claim of Holland & Short should be merged in said note (and said claim was and is merged in said note). That, in accordance with said agreement between Holland & Short and the defendant, said Holland and Short, individuals, made and executed said note, and delivered the same to the defendant, as plaintiff is informed and believes, and the said defendant sent the same to this plaintiff in order that this plaintiff might take the same in place of said claim of said firm of Holland & Short, and hold the same as collateral security, but this plaintiff is unwilling to take and accept the said note as collateral security, and has returned the same to the defendant. That the plaintiff has now no security whatever for its said claim, and that the pretended giving of security by the defendant to the plaintiff was unfairly, and, as plaintiff believes, fraudulently, made and attempted for the purpose of defrauding the plaintiff of any chance to secure his claim by attachment, and of defrauding plaintiff out of his said claim, and that there was never in fact any security. That this attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditors <sup>338</sup> of the defendant." It is contended by appellant that as the affidavit admits the receipt by the plaintiff of the account or claim against Holland & Short, and does not show that the same was ever returned to the defendant, we must conclude that said claim or account was so kept and retained by plaintiff as security for the debt for which attachment was sought. Accepting the statements in the affidavit as true—which, for the purposes of this case, we must do—no issue having been raised by the filing of counter-affidavits or otherwise upon this question, we must base our conclusions entirely upon the record before us. Does it support this con-



tention? The claim of account against Holland & Short was accepted by plaintiff conditionally, to wit, that the same should be substituted by the note of said firm of Holland & Short. The defendant procured and sent to plaintiff the individual note of Holland and Short, which plaintiff declined to accept, and returned, as not being in conformity with its agreement with defendant. Conceding that the account or claim against Holland & Short remained in the possession of plaintiffs, of what avail was it to them as security? The plaintiff could not sustain an action upon the account against Holland & Short, for it had at the demand of its creditor (the defendant) liquidated the claim by giving a note therefor; so the same was valueless in the hands of plaintiff or anyone else, and this impairment of value was in no way attributable to the acts of the plaintiff. It is not necessary to attribute any fraud or wrongful motive to defendant in this transaction. It is sufficient to say that it appears that, from the record before us, the agreement to give the plaintiff security was not carried out according to its terms, and that the security proffered was not accepted, but was returned to the defendant. This case is not in parity with *Murphy v. Montandon*, 3 Idaho, 325, 35 Am. St. Rep. 279, 29 Pac. 851. In that case the plaintiff had received and accepted a draft or order, and had not only retained it, but had received partial payment thereof. The consideration of this point does not involve the question of amendment of the affidavit. We think the affidavit, as set forth in the record, was sufficient.

Appellant objects to the affidavit for attachment in the case of *Standard Oil Co. v. Alturas Commercial Co.* upon the ground **339** that the same was not signed by the affiant, although duly verified. The authorities upon this question are somewhat conflicting. The trend of decision seems to be directed, if not controlled, by the letter of the statutes. If the statute requires, as in some cases it does, that the affidavit shall be "signed and sworn to," or "subscribed and sworn to," the letter of the law has been held to control, and the signature of the affiant held to be an indispensable requisite to validity of the affidavit. On the other hand, when the statute has not in terms made the signing of the affidavit a necessary incident, the absence of the signature of the affiant has been held not to invalidate the affidavit. Some of the chancery courts of this country, following a rule laid down by the chancery courts of England, have in-



sisted upon the presence of the signature of the affiant to give validity to the affidavit, but a contrary rule has obtained in the courts of law from a very early period. In *Haff v. Spicer* (1805), 3 Caines, 190, it was quite peremptorily held that the absence of a signature to the affidavit did not invalidate it. The court says (and this is the whole text of the decision): "It begins with his name, and that is sufficient"; and this ruling is followed and affirmed by the same court in *Jackson v. Virgil*, 3 Johns. 540, and this rule seems to have obtained generally, when the wording of the statute has not required a departure therefrom. Under the weight of authority, and the imperative requirements of section 4 of our Revised Statutes, we feel constrained to hold that the signing of the affidavit was not in this case an indispensable prerequisite to the issuance of the attachment; although we believe, with many of the authorities who thus hold, that it is the better practice to have the signature of the affiant appear upon the affidavit, as it doubtless would do but for mistake or inadvertence on the part of the attorney in drawing the papers.

Objection is made by appellant to the undertakings filed in both of the cases under consideration. In the case of *Simmons Hardware Co. v. Alturas Commercial Co.* the original undertaking closes with these words: "The plaintiff will pay all costs that may be awarded to the defendant, and all damages that he may sustain by reason of attachment under execution, in the sum of four thousand dollars." It is palpable that the words "under execution" <sup>340</sup> were inserted by inadvertence or mistake. They have neither pertinence, place or meaning as they appear, nor would they, in our opinion, at all affect the validity of the undertaking. We think they come clearly within the rule laid down by Judge Amasa J. Parker in *Teall v. Van Wyck*, 10 Barb. 379, which is as follows: "When the words of a bond are not sufficiently explicit, or, if literally construed, the words would be nonsense, it must be construed with reference to the intention of the parties. In doing this it is allowable to depart from the letter of the condition, to reject insensible words, and to supply obvious omission." The intention of the party here was to procure a remedy provided by the statute, by a compliance with the terms and conditions of the statute. The object and purpose of the statute is that one seeking the remedy by attachment shall, before being allowed to avail himself of such remedy, give the indemnity to the defendant re-

quired by the statute. We think the indemnity required by the statute was complete under the first undertaking, but, even if it were not, the filing of the second undertaking by leave of court placed the matter beyond cavil.

The objection of appellant that the filing of the second undertaking was unauthorized is not tenable. We have found no authorities in support of this contention, while, aside from the plain and unequivocal provision of our own statutes, all the authorities we have been able to consult upon the question are against the contention of appellant. Our conclusions cover the objections raised by appellant to the undertaking in the case of *Standard Oil Co. v. Alturas Commercial Co.* The orders of the district court in both cases are affirmed, with costs.

Morgan, C. J., and Sullivan, J., concur.

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*An Affidavit* is good though the signature of the affiant, instead of being affixed below the body of the affidavit and above the jurat, appears below the official signature of the notary: *Kohn v. Washer*, 69 Tex. 67, 5 Am. St. Rep. 28, 6 S. W. 551. And it is held that an affidavit need not be signed by the deponent: *Shelton v. Berry*, 19 Tex. 154, 70 Am. Dec. 326.

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## WORDEN v. WITT.

[4 Idaho, 404, 39 Pac. 1114.]

### **PUBLIC OFFICERS—Individual Liability for Negligence.—**

County commissioners are not individually liable in damages for injury caused by defective public highways or bridges. (p. 72.)

J. W. Reid, for the appellant.

J. H. Forney, for the respondents.

**406** *HUSTON, J.* Plaintiff sued defendants, as commissioners of Idaho county, for injuries alleged to have been sustained by him through defects in a certain bridge in said county, while passing across the same. A general demurrer was interposed to the complaint, which was sustained by the court, and leave given plaintiff to amend, which was done. By agreement of counsel, the title of the case was changed, in the summons and complaint, by striking out the words "Commissioners of Idaho County." The case was tried to a jury, and after the evidence on the part of the plaintiff was submitted, on motion of defendants, the action was dismissed, and judgment entered for defendants for costs, from which judgment,

and the order denying motion for new trial, this appeal is taken.

The only question presented by the transcript is the liability of the county commissioners, individually, for the damages claimed to have been sustained by plaintiff on account of the defective bridge.

The first error assigned is the sustaining of the demurrer to the complaint. We think there was no error in this action of the court. It is evident from the record that the ground upon which the court sustained the demurrer to the complaint was the want of a statement of notice to the defendants of the condition of the bridge, as the amended complaint, to which a general demurrer was interposed, and overruled by the court, only differs from the original in containing such statement of notice to and knowledge of the condition of the bridge by defendants.

The appellant, in his brief, submits two questions for the decision of the court: 1. Is the county liable to the plaintiff? and 2. Are the commissioners liable individually? The first question is not raised by the record. There was no action against the county. As to the second question, the law can hardly be said to be conclusively settled, or, at least, the decisions are not entirely harmonious. Judge Cooley, in his work on Torts (page 379), says: "The rule of official responsibility, then, appears to be this: That, if the duty which the official <sup>407</sup> authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages." In applying this rule to the case of officers charged with the duty of making and repairing highways and bridges, the courts seem to be influenced largely by the exigencies of the case presented, or the conditions under which it arises, as, for instance, in the older and more thickly populated states there seems to be a growing disposition, both by legislative action and judicial decisions, to hold this class of officers, as well as the municipalities they represent, to a more enlarged liability. This will be made apparent by comparing the case of Bartlett v. Crozier, 17 Johns. 439, 8 Am. Dec. 428, and note, with Hoover v. Barkhoof, 44 N. Y. 413, and other recent decisions. But this

change of base has not been recognized in states where entirely different conditions exist. To hold counties or county commissioners liable for all injuries arising from defective highways, in this country, would result in two very undesirable conclusions—the literal abrogation of the office of county commissioners (for no sane man would assume the position, with such a liability attached), and the bankruptcy of every county in the state. Had there been any intention on the part of the legislature to impose such a liability upon the county commissioners, they would have said so, by unequivocal enactment. The supreme court of Idaho, in *Gorman v. Commissioners*, 1 Idaho, 655, settled the question of the liability of both the county and the county commissioners in this jurisdiction, and with that decision we concur. The judgment of the district court is affirmed, with costs.

Morgan, C. J., and Sullivan, J., concur.

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**LIABILITY OF MINISTERIAL OFFICERS TO PRIVATE INDIVIDUALS FOR THE NONPERFORMANCE AND MISPERFORMANCE OF OFFICIAL DUTIES.\***

- I. Liability in General.
  - a. At Common Law.
  - b. Who may Sue.
  - c. Time for Performance.
  - d. Malice.
  - e. Pleading and Proof.
  - f. Measure of Damages.
  - g. Defenses
    1. Must be Officer De Jure.
    2. Miscellaneous Defenses.
  - h. Responsibility for Official Subordinates.
- II. County Boards, Boards of Supervisors, and Other Governing Bodies.
  - a. Liability for Ministerial Acts.
    1. Various Ministerial Duties.
    2. Maintenance of Streets and Roads.
      - A. Nature of the Duty.
      - B. Necessary Allegations.
      - C. Reasons for and Against Personal Liability.
    3. Nuisances.
  - b. Liability for Judicial Acts.
    1. Duties Involving Discretion.
    2. Legislative Functions.

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\*REFERENCES TO MONOGRAPHIC NOTES.

Remedy of debtor whose exemption rights have been disregarded: 75 Am. Dec. 645-653.

Liability of public officers to private individuals: 90 Am. Dec. 726-732.

When act of incumbent is to be regarded as official: 6 Am. St. Rep. 130-133.

Duty and liability of officer upon receiving indemnity: 15 Am. St. Rep. 315, 316.

Right of sheriff to indemnity: 89 Am. St. Rep. 413-419.

**III. Superintendents of Streets and Highways.****IV. Registers of Deeds and Recorders.**

- a. Failure to Record Instruments.
- b. Failure to Keep Index.
- c. Searching Titles.
- d. In Whose Favor Right of Action Accrues.
- e. Damages Recoverable.

**V. Clerks of Court, County Clerks, and Prothonotaries.**

- a. Injury and Loss.
- b. Failure to Enter, or Mistake in Entering Judgment.
- c. Failure to Issue Execution, or Mistake Therein.
- d. Loss on Appeal or of Right to Appeal.
- e. Taking Illegal Fees.
- f. Refusal to Pay Out Money.
- g. Approving Bonds.
  - 1. Liability for Negligence.
  - 2. Allegations.
- h. Defenses.
  - 1. Negligence, Sickness, Ignorance.
  - 2. Contributory Negligence.
  - 3. Order of Court.
- i. Indexing Documents.

**VI. Sheriffs, Constables, and Marshals.**

- a. Importance of the Office.
- b. Acting under Process.
- c. Failure to Levy.
  - 1. Liability Therefor.
  - 2. Defenses.
  - 3. Diligence Required in Executing Process.
  - 4. Measure of Damages.
  - 5. Pleadings.
- d. Failure to Sell.
- e. Delay in Levying.
- f. Excessive Levy.
- g. Insufficient Levy.
- h. Failure to Return and False Return.
- i. Liability in Attachment Proceedings.
  - 1. Generally Same as on Execution.
  - 2. Defenses.
- j. Care of Property in Officer's Charge.
  - 1. Diligence Required.
  - 2. Receipts.
  - 3. Excuses for Loss.
- k. Receiving Other than Money in Payment.
- l. Failure to Pay Over Money.
  - 1. At Common Law.
  - 2. Statutory Penalties.
  - 3. What Actions Will Lie.
  - 4. Defenses.
- m. Disobeying Plaintiff's Instructions.
- n. Liability in Taking Bonds.
- o. Escapes.
  - 1. Voluntary and Negligent.
  - 2. Defenses
  - 3. Measure of Damages.
    - A. The American Rule.
    - B. The English Rule.
- p. Arrest and Bail.
- q. Liability for Seizing Exempt Property.



1. The Two Kinds of Exemption.
2. Actions Maintainable.
3. As a Defense for not Levying.
- r. Seizing Property of a Third Person.
  1. The Writ as Protection.
  2. Defenses.
    - A. Various Defenses.
    - B. Fraudulent Conveyances.
    - C. Intermingled Property.
      - (1.) Liability to Seizure.
      - (2.) Tenants in Common.
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  - 3 Remedies.
    - A. Common-law Actions.
    - B. Statutory Actions.
  4. Damages.
  5. Property in Stranger as Defense for not Levying.
- s. Indemnity.
  1. Right to Demand.
  2. Indemnity as Estoppel to Plead Title in Stranger.
- t. Use of Force.
- u. Liability for Lynching of Prisoner.
- v. Liability to Surety.
- w. Deputy Sheriffs.
- x. Summary Remedies.
  1. Rule or Amercement.
  2. Constitutionality.

## VII. Inspectors.

## VIII. Notaries Public.

### I. Liability in General.

a. **At Common Law.**—Where by misfeasance or nonfeasance, one causes damage or loss to another, it is axiomatic that he is liable to him in law to the extent of such injury. This rule applies at common law to all public officers, and for their neglect or refusal to perform the ministerial functions connected with their office they are liable to respond in damages: *Mock v. City of Santa Rosa*, 126 Cal. 330, 58 Pac. 826; *Jenner v. Joliffe*, 9 Johns. (N. Y.) 381.

It is the nonperformance or wrongful performance of the duty which is the gist of the action, and, as is stated by the court in *Olmsted v. Dennis*, 77 N. Y. 378: "It is not needful in such a case to show that the public officer, charged with the performance of ministerial duties, has acted willfully or maliciously. Such an officer is under constant obligation to discharge the duties of his office with reasonable skill and care; and if he fails in these, and damage ensues to one specially interested in the discharge of such duties, he becomes liable for such damage."

b. **Who may Sue.**—While every failure in an officer to perform his duty is a breach thereof, it is not on that account alone actionable at the suit of every individual member of the community; and a private person can recover from the officer only when he can show special damage to himself, which must be the legal and natural consequences of the wrongful act: *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Amr. Dec. 219; *State v. Ruth*, 9 S. Dak. 84, 68 N. W. 189. If

however, the breach of duty was one owing to the public alone, he can recover nothing, even though specially injured thereby: *School Dist. etc. v. Burress* (Neb.), 89 N. W. 609, in which case it was held that the duty imposed on the county commissioners of levying a tax voted by a school district meeting is one owing to the public only, and so where in good faith they erroneously levy a less tax, they are not personally liable to the school district. The distinction between public and private duty is well set forth in that case in the following words: "The personal liability of the officer depends not only upon the nature of the duty, but also upon the person or body of persons in whom the corresponding right inheres. For instance, the duty of the county clerk to file chattel mortgages or articles of incorporation duly tendered him for filing is a duty owing to the individuals by whom such instruments are tendered. On the other hand, his duty to record the proceedings of the county board is one owing to the public only. In the one case, a right inheres in the individual injured; in the other, it is exclusively in the public. This clear and obvious distinction is the basis of the rules as to personal liability of officers to individuals for nonperformance or improper performance of ministerial duties. An individual has no right of action against a public officer for breach of a duty owing to the public only, even though such individual is specially injured thereby: *McConnell v. Dewey*, 5 Neb. 385; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169; *Moss v. Cummings*, 44 Mich. 35, 96 N. W. 843; *Cooley on Torts* 2d ed. 446; *Meechem on Public Officers*, sec. 598. . . . . Where the duty is one for performance of which the officer receives a fee from the person directly interested in its performance, as in case of service of process by the sheriff, recording of conveyances by the register of deeds, or filing of chattel mortgages by the county clerk, the case is clear enough. In other cases we must take into account the nature of the office, as well as the nature of the duty and interest of individuals in its performance, and must consider how far the public interest will be subserved by the right in individuals to hold the officer personally liable, and how far the legislature may be regarded as having contemplated such result when it imposed the duty or created the office. Distinction must be made 'between those officers whose duties are of a general public nature, and who act for the public at large, and that other class of officers who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for a specific fee paid. Upon this distinction, it seems, the common-law rule is founded, and is sustained by reason and principle; for in the one case the officer acts for the public in general, and the manner in which he executed his trust is between him and the public; but in the other he acts for the individual, for a reward emanating from him, and therefore the manner in which he performs his duty is a personal matter between him and the individual': *McConnell v. Dewey*, 5 Neb. 385.'" So where by law a county treasurer is not

to indorse warrants issued by school district officers unless the signatures thereon correspond with those on file in his office, it was passed for the benefit of the school district and the county treasurer, and his indorsement of a signature is not a warranty of its genuineness, for which he is liable to an assignee of a warrant: *Roberts v. Prescott*, 15 Wash. 462, 46 Pac. 642. See, also, *Miller v. Ouray Elec. etc. Co.* (Colo. App.), 70 Pac. 447.

**c. Time for Performance.**—When a statute prescribes a time within which a public officer is to perform official acts regarding rights of others, the general rule is that it is directory as to the time, unless from the nature of the act the designation of the time must be considered a limit on the power of the officer: *Walker v. Chapman*, 22 Ala. 116; *Commissioners' Court etc. v. Rather*, 48 Ala. 433; *Hart v. Plum*, 14 Cal. 148; *People v. Murray*, 15 Cal. 221.

**d. Malice.**—There seems to be a slight conflict among the authorities as to the effect of malice upon the liability of public officers for their acts. In *Parks v. City Council etc.*, 44 S. C. 168, 21 S. E. 540, it was held that officers of a municipal corporation were not liable for acts done by them under its direction which the corporation was expressly authorized to do, unless they acted with culpable negligence or maliciously; and the rule is stated in *Burton v. Fulton*, 49 Pa. St. 151, to be that public officers acting within the scope of their authority are not answerable in damages for the consequences of their acts, unless done maliciously and with intent to injure. Where a superintendent of wharves, claiming, and erroneously supposing, he had authority, ordered a brig removed from plaintiff's wharf, whereby he lost wharfage, and the plaintiff sued him for the injury, it was held that it must clearly appear that his motives were privately malicious and that he needlessly used his official power to gratify a spirit of revenge: *Gregory v. Brooks*, 37 Conn. 365.

The better rule, however, is that if the act of the public official is lawful, the motive with which it is done should not be looked into; if it is unlawful the motive may operate upon the question of damages: *Moran v. McClearns*, 4 Lans. (N. Y.) 288. See, also, *Anderson v. Park*, 57 Iowa, 69, 10 N. W. 310; *Packard v. Voltz*, 94 Iowa, 277, 58 Am. St. Rep. 396, 62 N. W. 757. And where the action is for willful neglect to perform duties imposed by statute, the gravamen of the action is such neglect, and the question of malice or good faith cannot be considered: *Strickfaden v. Zipprick*, 49 Ill. 286. The same rule was applied to the head of one of the departments of government, in *Spalding v. Vilas*, 161 U. S. 483, 16 Sup. Ct. Rep. 631, where Justice Harlan said: "In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective adminis-

tration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint."

**e. Pleading and Proof.**—When a person in authority is required to do a certain act, which could not be omitted without a neglect of duty, the performance of it will be presumed, and the burden of proving the contrary is upon the party asserting it: *Dollarhide v. Muscatine County Commrs.*, 1 G. Greene (Iowa), 158. To make an officer liable, acting within the scope of his authority as an officer, it must be shown that he greatly abused his authority; and the making of such a mistake as a person of ordinary care and intelligence might make is not such an abuse: *Lecourt v. Gaster*, 50 La. Ann. 521, 23 South. 463. Where a party sued for trespass, personally and individually, is a public officer, the proof must affirmatively show that he did some wrongful or illegal act tending to render him personally liable; and in the absence of such proof he cannot be held responsible for illegal acts performed under color of official authority: *Bright v. Murphy*, 105 La. 795, 30 South. 145. Where the action is for failure to perform statutory duties, a general averment of the officer's duty to perform such service is sufficient, the court taking judicial notice of the statute imposing the duty; and the issue that the alleged duty is not imposed is raised by demurrer: *Burns v. Moragne* (Ala.), 29 South. 460. Where an officer is sued by name, and the word "as" is omitted after it and before the title of the officer, he is sued individually, the name of the office being merely *descriptio personae*: *Bennett v. Whitney*, 94 N. Y. 302; and where relief is sought against officers in their official capacity, they are properly sued as officers: *Mock v. City of Santa Rosa*, 126 Cal. 330, 58 Pac. 826. A declaration, however, in an action against a public functionary for neglect is not demurrable on the ground that the defendant is sued in his individual character while described in his official: *Highway Commrs. v. Beebe*, 55 Mich. 137, 20 N. W. 826. Each officer is liable only for his own acts or omissions, and so a joint action will not lie against three successive county treasurers to recover damages for the alleged mismanagement of trust funds: *Firth v. Roe*, 60 How. Pr. (N. Y.) 432.

**f. Measure of Damages.**—In an action against an officer for neglect or misconduct, the actual injury sustained is the measure of damages, unless some statute prescribe otherwise: *Gay v. Burgess*, 59 Ala. 575; and where a public official converts or misappropriates moneys intrusted to him, he is liable for interest from that time: *McPhillips v. McGrath*, 117 Ala. 549, 23 South. 721. Where, however, officers and boards appear to have acted in good faith, costs are not generally imposed on them: *Serafford v. Gladwin County Supervisors*, 42 Mich. 464, 4 N. W. 167.

#### **g. Defenses.**

**1. Must be Officer De Jure.**—When a person seeks to recover from an officer who has been exercising the duties of his office, it is only



necessary for him, in order to maintain his action, to show that the defendant was exercising such duties, or, in other words, that he was a *de facto* officer: *Neale v. Overseers of the Poor*, 5 Watts (Pa.), 538. But a more stringent rule applies when he attempts to defend himself by virtue of any act done in his official capacity. "The general rule of law is, when an officer justifies an act complained of, purporting to be done in his official capacity, that it is necessary that he should aver and prove, in his defense, not only that he was an acting officer, but that he was an officer in truth and right, duly commissioned and qualified to act as such; while as to all others, it is sufficient for them to aver and prove that he was acting as such officer. And the reason of the rule is, that the officer himself is bound to know whether he is legally an officer, and if he attempts to exercise the duties of an officer, without authority, he acts at his peril; whereas it is sufficient, so far as the rights of third persons or the public are concerned, that the officer is acting in his official capacity, and under color of title; for it would be unreasonable and oppressive to compel them, before they put faith in his official acts, to go into a minute examination of all of the evidence of his title to the office, and see that he has complied with all the necessary forms of law": *Schlencker v. Risley*, 4 Ill. (3 Scam.) 483, 38 Am. Dec. 100; in accord with which are *People v. Weber*, 89 Ill. 347; *Grace v. Teague*, 81 Me. 559, 81 Atl. 289; *Short v. Symmes*, 150 Mass. 298, 15 Am. St. Rep. 204, 23 N. E. 42; *Blake v. Sturtevant*, 12 N. H. 567; *Roberts v. Holmres*, 54 N. H. 560; *Colton v. Beardsley*, 38 Barb. (N. Y.) 29; *Pearce v. Hawkins*, 32 Tenn. (2 Swan) 87, 58 Am. Dec. 54; *Cummings v. Clark*, 15 Vt. 653.

2. **Miscellaneous Defenses.**—When a penalty is imposed on a ministerial officer for not performing an official act, although the law may not in express terms admit of any excuse, yet it implies that a reasonable excuse will be heard: *Underwood v. Russell*, 4 Tex. 175. But ignorance or mistake, though honest and in good faith, is no excuse for failure to obey the law by performing his duty: *School Dist. v. Burress* (Neb.), 89 N. W. 609; *Robinson v. Bishop*, 39 Hun (N. Y.), 370. Officers are created for the benefit of the community and not for the emolument of individuals, and every public officer ought to know his duty and exercise it faithfully: *Work v. Hoofnagle*, 1 Yeates (Pa.), 506; and where an officer has the opportunity to ascertain what, under circumstances arising or expected to arise, is his duty, and he neglects to do so and chooses to act without such knowledge, he takes the risk of acting on his own responsibility: *State v. Colton*, 9 Houst. (Del.) 530, 33 Atl. 259. Public necessity may be a good plea; as, where a public officer is sued for blowing up a building, he may show that he did so to prevent the spread of a conflagration: *American Print Works v. Lawrence*, 23



N. J. L. 590, 57 Am. Dec. 420. Where an officer, acting as such, notifies plaintiff to remove a quantity of pig-iron, giving him a certain time in which to do so, and before the expiration of that time, he himself removes it, he cannot defend upon the ground that it was a nuisance which he, as a private citizen, had a right to remove: *Coddington v. White*, 9 N. Y. Sup. Ct. (2 Duer) 390. In an action against an officer for willful neglect to perform a duty, the question of contributory negligence cannot arise: *Strickfaden v. Zipprick*, 49 Ill. 286. Where an officer made false and fraudulent representations in relation to property sold by him, it was held no answer to an action for such deceit that the sale was made in his official character: *Culver v. Avery*, 7 Wend. 380, 22 Am. Dec. 586. Proceedings under authority of a void by-law afford no justification to an officer who undertakes to execute it: *Bergen v. Clarkson*, 6 N. J. L. 352. The statute of limitations may, of course, be pleaded, and where an officer is sued for balances reported against him at three several times, the action must be deemed to have accrued against him at the date of the last balance: *Gorham v. Wing*, 10 Mich. 486.

**h. Responsibility for Official Subordinates.**—With regard to the responsibility of a public officer for the misconduct or negligence of his official subordinates, “the distinction generally turns upon the question whether the persons employed are his servants, employed voluntarily and privately and paid by him, and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is a public officer or private service. In the former case the official superior is not liable for the inferior’s acts; in the latter he is”: *Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445. These exemptions are due in a great measure to considerations of public policy; but these officers are responsible for lack of proper and reasonable care in the choice of their agents or in the superintendence of them in the discharge of their allotted duties: *City of Richmond v. Long’s Admrs.*, 17 Gratt. (Va.) 375, 94 Am. Dec. 461. Public officers are not responsible for the fraudulent transactions of their clerk, if it is not attributable to their own negligence: *United States v. Brodhead*, 3 Law Rep. 95, Fed. Cas. No. 14,654; so where a deputy clerk issues false warrants, the clerk is not liable in an action by one who bought the warrants believing them to be genuine: *Whyte v. Mills*, 64 Miss. 158, 8 South. 171. But in *Mayor v. Blache*, 6 La. 500, it was held that if a city treasurer, under resolution of the city council, employs a bookkeeper, in whose power he puts it to steal money and disguise his peculations by false entries, he becomes the confidential agent of the treasurer, and not a mere bookkeeper, and the treasurer is liable for his misconduct. If the superior has no authority to make a certain order, the inferior officer is not protected in carrying it out: *Jones v. Commonwealth*, 64 Ky. (1 Bush.) 34, 89 Am. Dec. 605.

Where it is intended to charge a postmaster for the negligence of his assistants, the pleadings must so be made up; and his liability then will only result from his own neglect in not properly superintending the discharge of duties in his office: *Dunlop v. Monroe*, 7 Cranch, 242. One acting gratuitously as a public officer is not liable personally for the negligence of persons necessarily employed in the execution of an order properly given by him: *Donovan v. McAlpin*, 85 N. Y. 185, 39 Am. Rep. 649.

## II. County Boards, Boards of Supervisors, and Other Governing Bodies.

### a. Liability for Ministerial Acts.

1. **Various Ministerial Duties.**—Boards of supervisors, county boards and like bodies are invested with ministerial powers and with discretionary powers in matters coming under their control. Where their duties are ministerial and they fail in the performance of them, or carry them out negligently, they are liable to all whom they injure: *Felch v. Town of Weare*, 69 N. H. 617, 45 Atl. 591; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Druecker v. Salomon*, 21 Wis. 621, 94 Am. Dec. 571. If the selectmen of a town set a workman to work on a public sewer, and provide no proper supports, they are liable to him, and whether they were acting as public agents, or not, could under the circumstances make no difference as to their duty to the plaintiff, for they were bound, when setting him to work in a particular place, to see that it was reasonably safe: *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075. The silence of a member of a city council when announcement is made in his presence that a measure has been adopted by such body, providing for a catch-basin, in which a child is subsequently drowned, does not establish his assent to the measure, or render him liable as a joint tort-feasor: *Carle v. City of De Soto*, 63 Mo. App. 161. In *Fuller v. Mower*, 81 Me. 380, 17 Atl. 312, the defendant, one of the board of selectmen, signed and delivered to the chairman a town order in blank, to be used for a legitimate purpose; the chairman issued it to plaintiff, who loaned him money thereon for the use of the town, relying on his assurance that the board was authorized to hire the money, which was untrue. The defendant was ignorant of this use of the order, and in an action of deceit brought against him was held not liable for selectmen are not the agents of each other. After demand upon and refusal by the officers of a municipal corporation to raise funds to pay off certain judgments, if it is within their power so to do, they are individually liable: *Oswald v. Thedinga*, 17 Iowa, 13; *Porter v. Thomson*, 22 Iowa, 391. In order to recover against public officers having the control and distribution of public moneys, for nonpayment of a debt liquidated by judgment against the corporation, it is necessary to prove that the fund required to pay was raised, that it was diverted, and that the creditor has sustained a loss:

*Jones v. Currie*, 34 La. Ann. 1093. And where the board of aldermen of a town voted one thousand dollars of the town's money to pay an obligation which they and a few others had bound themselves to discharge, and they took the money, it was held a conversion for which they were liable to the taxpayers: *Russell v. Tate*, 52 Ark. 541, 20 Am. St. Rep. 193, 13 S. W. 130. A city board can justify their acts by the authority of the city, in an action of tort brought against them, only to the same extent as the city might do, so where the city fails to file certain documents as required by statute, relating to the taking of a waterway, and the water is diverted, in an action of tort against the members of the board it was held that, even if their acts were authorized by the city, they became liable as trespassers for failure to file the documents prescribed by statute: *Wamresit Power Co. v. Allen*, 120 Mass. 352. The mere act of making a town liable by statute for the default of an officer acting as agent or deputy does not deprive a party injured of his right to proceed against the person causing the injury: *Rounds v. Mansfield*, 38 Me. 586; and so the fact that a valid ordinance makes a city liable for a street grading will not exculpate the city officers who participated in the work, since they are cotrespassers: *Rives v. City of Columbia*, 80 Mo. App. 173.

## 2. Maintenance of Streets and Roads.

**A. Nature of the Duty.**—One of the most important duties incumbent upon boards of this character is the maintaining of streets and roads in good condition. Such a duty is ministerial, and a public officer charged therewith cannot excuse himself on the ground that, in his judgment, it was best not to repair it: *Percy v. Averill*, 37 Hun, 360. In *Daniels v. Hathaway*, 65 Vt. 247, 26 Atl. 970, however, it is held that this duty is quasi judicial in its character, the court using the following language: "In matters relating to highways they act as a board, and their duties are, to a certain extent, judicial, or quasi judicial. It is their duty to seek information as to the existence or nonexistence of certain facts, form a judgment, and act accordingly; they are to determine whether other officers have refused or neglected to perform their duty. If they find they have not, it is not their duty to order repairs; but if they find there has been a refusal on the part of other officers, or an absence of other officers, it is their duty to determine what repairs are necessary, where they are most needed, where the means at their command can be most judiciously expended, what dangers ought to be guarded against, determine whether there are insufficiencies, and if they find there are, to adopt plans for building or repairing the same, award contracts for the work, or order the same repaired upon the credit of the town. The performance of these duties requires the exercise of judgment, and for the exercise of this judgment, or an omission to exercise such judgment as some other authority may think they ought to have exer-

cised, they are not responsible to an individual.” Where by charter the common council is bound to provide by ordinance for repairing the streets, if it willfully neglects to do so, the members thereof are liable personally to anyone injured in consequence thereof: *Balls v. Woodward*, 51 Fed. 646. And where a charter provided that the city should not be liable for any accident on account of the condition of the streets, but that it did not exonerate any officer from such liability caused by willful neglect of a duty enjoined on him, it was held that if a person was injured by failure to keep the streets repaired on the part of the board of trustees, upon whom the duty was enjoined, the latter were liable in damages: *Rankin v. Buckman*, 9 Or. 253. The trustees of a village, in the exercise of their powers as highway commissioners, are not liable for the construction of a coffer-dam in order to build a bridge, which causes land near by to be overflowed, if the work is carefully and skillfully performed: *Atwater v. Trustees etc.*, 124 N. Y. 602, 27 N. E. 385, where it is said: “The doctrine, however, is well established in this state, that public officers lawfully employed in making public improvements, and corporations engaged in the performance of work of a public nature authorized by law, are not liable for consequential damages occasioned by it to others unless caused by misconduct, negligence or unskillfulness. And such is the weight of authority elsewhere: *Transportation Co. v. Chicago*, 99 U. S. 635, 641.” Municipal officers are not liable to private individuals for the results of an act which is strictly within their official powers and duties; so the vote of village trustees, whose duty it is to maintain the streets, to provide a stone-crusher to break rocks for the streets, is an official act, and they are not liable if a person’s horse becomes frightened at it and runs away, causing him injury: *Bates v. Horner*, 65 Vt. 471, 27 Atl. 134.

The power given to a city over its streets may be delegated to a street committee composed of members of the board of aldermen, and the members thereof, acting as such and within the limits of the powers of the city, are not individually liable for damages resulting from their acts: *Tate v. City of Greensboro*, 114 N. C. 392, 19 S. E. 767.

**B. Necessary Allegations.**—Where a party seeks to recover damages from public officers for neglecting to perform their duty, the complaint should state enough to show a violation of such duty. So highway commissioners are not liable for a defect in a bridge, if it is not alleged that they had sufficient funds on hand to repair it, as they are not required to spend their own money: *Smith v. Wright*, 27 Barb. 621. Such is not necessary, however, in the case of misfeasance, where the officer has acted, but negligently, to the special injury of the plaintiff: *Bennett v. Whitney*, 94 N. Y. 302.

**C. Reasons for and Against Personal Liability.**—It is sometimes advanced as a reason against holding county commissioners liable



for defective highways that it would keep responsible men out of office, on account of the onerous burden consequent upon such holding: *Worden v. Witt*, 4 Idaho, 404, ante, p. 70, 39 Pac. 1114 (the principal case). This reasoning does not meet with the approval of the New York court, and it is well answered in the following words: "A further argument is that public policy should forbid us to hold the defendants liable, inasmuch as such a rule of liability would drive from the common council persons of responsibility. We cannot give much weight to this argument. The defendants say we ought to be allowed to accept office and knowingly to neglect our duties, without any liability to those whose limbs are broken through our negligence, because no responsible persons will accept office except on the condition that they may neglect their duties with impunity. It is enough to say in reply to this that it is better to have irresponsible officers who attend to their duties than responsible officers who do not": *Piercy v. Averill*, 37 Hun, 360.

3. **Nuisances.**—Where the council of a municipal corporation, in the exercise of their police power, and after due notice, declare a building a nuisance and tear it down, they are not individually liable unless acting maliciously, corruptly, or unlawfully: *Pruden v. Love*, 67 Ga. 190; and where a building of a certain kind is regularly declared a nuisance, and public officers prevent such a structure going up, they incur no personal liability: *Privett v. Whitaker*, 73 N. C. 554.

#### b. Liability for Judicial Acts.

1. **Duties Involving Discretion.**—As before remarked, for the misperformance and nonperformance of ministerial functions, such officers are liable, but where the duty imposed is in its nature judicial, they are not answerable: *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; and where judgment or discretion is required to be exercised the duty is judicial: *Daniels v. Hathaway*, 65 Vt. 247, 26 Atl. 970, and they are answerable, in the exercise of such discretion, only when corruptly or maliciously exercised: *Edwards v. Ferguson*, 73 Mo. 686; *Baker v. State*, 27 Ind. 485; *Walker v. Hallock*, 32 Ind. 239. The duties imposed on a school committee, as to expelling scholars from a public school partakes of a judicial character, and for an honest, though erroneous, discharge, they are not liable in a suit for damages: *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256. So, where by charter city officers are required to award contracts to the lowest responsible bidder, giving adequate security, it is a judicial duty imposed, and it was held that such officers were not liable to an individual for an erroneous, or even corrupt, performance of such duty: *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557, affirming 25 Hun, 614. And a member of a common council cannot be held to respond in damages for refusing to approve a liquor bond, as the exercise of judgment is required: *Pawlowski v. Jenks*, 115 Mich. 275, 73 N. W. 238. In *Hannon v. Grizzard*, 99 N.



C. 161, 6 S. E. 93, it was held that the duties imposed on a board of county commissioners in respect to the induction of persons to offices to which they had been elected was quasi judicial, and no erroneous judgment, if honest, could make them liable. Officers and boards charged with decisions, quasi judicial in their nature, are entitled, in the exercise thereof, to the same immunity as judges: *State v. Hastings*, 37 Neb. 96, 55 N. W. 774, where this rule was applied to a board of public lands and buildings.

2. **Legislative Functions.**—Acts done by such boards in their legislative capacity cannot be made the basis of a suit in damages by an individual; and the motives of the members in passing an ordinance cannot be subjected to judicial inquiry: *Wimbish v. Hamilton*, 47 La. Ann. 246, 16 South. 856; *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508, in which case it is said: "Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use: *County Commrs. v. Duckett*, 20 Md. 469, 83 Am. Dec. 557; *Borough of Freeport v. Marks*, 59 Pa. St. 253." In the same case it is held that if they exceed their powers their acts are void, and if anyone obeys them, it is his own folly, for which the courts can afford him no relief by awarding damages against the individuals voting for the ordinance. In *Southworth v. Flanders*, 33 La. Ann. 190, it is set forth as the general rule that when officers of a municipal corporation, clothed with legislative functions, make a mistake as to the extent of their powers in that connection, and that mistake is shared by the party with whom they contract, who has an equal opportunity of information concerning the powers delegated to them, and there is nothing in the proceedings looking to personal responsibility, the officers are not personally liable in a tort action for usurping authority, which caused loss or damage to the plaintiff.

### III. Superintendents of Streets and Highways.

The responsibility of keeping highways and streets in good repair often rests upon an officer whose sole duty it is to attend to such matters. Where it is the duty of a superintendent of streets to attend to the repairing of sewers, if he undertakes to make any he must do so in a careful and skillful manner, and is liable for all damage resulting from his negligence; and the fact that he did the work in an official capacity does not relieve him from liability if guilty of negligence: *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922. Where, however, a street commissioner is duly authorized by a city council to construct a street within their jurisdiction, laid out by their action upon a petition in legal form, trespass will not lie against him for so doing: *Gay v. Bradstreet*, 49 Me. 580, 77 Am. Dec. 272; but where such officer excavates in order to use the earth in other parts of town, and in so doing removes the lateral support of adjacent lands to their injury, he is liable to the owner thereof in trespass: *Buskirk v.*

Strickland, 47 Mich. 389, 11 N. W. 210. The owner of a lot assessed for the construction of a sewer brought an action against a superintendent of streets for official neglect in accepting a sewer not constructed according to contract and specifications. He was allowed to recover not the full amount paid to discharge the assessment against him, where the sewer was not wholly valueless, but only his proportion of the amount required to place it in such good condition as to comply with the specifications: *Godsell v. Ashworth*, 115 Cal. 222, 46 Pac. 1066.

In fixing new grades, the surveyor of highways is bound to exercise a fair discretion having regard to public convenience and private rights; and if he acts recklessly or maliciously, thereby causing injury he will be personally liable therefor: *Rounds v. Mumford*, 2 R. I. 154. Persons employed by a town to make repairs in a highway which cause a change in the grade are not liable to the owner of abutting land damaged thereby, if they act within the scope of their authority, under vote of the town, which itself has power to make such repairs: *Proctor v. Stone*, 158 Mass. 564, 33 N. E. 704; *Scovil v. Geddings*, 7 Ohio, pt. 2, 211.

#### IV. Registers of Deeds and Recorders.

a. **Failure to Record Instruments.**—Registers of deeds, recorders, and like officers, are ministerial officers, upon the faithful performance of whose duties the validity of transfers of land especially depends, and a perusal of the authorities will show that they are generally held to strict accountability for their acts and omissions in the performance of their official duties.

The rule is universal that if a register of deeds fail to record an instrument, and by his omission one is damaged, he is liable to such person for all the injury he has sustained in consequence thereof: *Perkins v. Adams*, 46 Mass. (5 Met.) 44; *Hartwell v. Riley*, 62 N. Y. Supp. 317, 47 App. Div. 154; *State v. Grizzard*, 117 N. C. 105, 23 S. E. 93; and this same rule applies to all persons who are ex-officio recorders, as a town clerk: *Welles v. Hutchinson*, 2 Root (Conn.), 85; a clerk of court: *Baker v. See*, 49 La. Ann. 874, 21 South. 588; or a probate judge: *Norton v. Kumpe*, 121 Ala. 446, 25 South. 841. In *Luther v. Banks*, 111 Ga. 374, 36 S. E. 826, it was held that the duties imposed on the clerk of a superior court in relation to the recording of mortgages and the entries of cancellations constituted him a ministerial officer, although the performance of those duties required to a certain extent the exercise of judgment and discretion; and as a ministerial officer, liable to any person injured by reason of his failure to act, as well as for improper or negligent performance of such duties. Of course, where the officer records the conveyance in a wrong book, he is liable for the ensuing damage: *Watkins v. Wilhoit* (Cal.), 35 Pac. 646; and likewise where a marginal release of a mortgage is made opposite lands other than those actually released: *Mechanics' Bldg. Assn. v. Whitacre*, 92 Ind. 547. In *Ramsey v.*

Riley, 13 Ohio, 157, a suit was brought against a recorder for recording a forged receipt for money due on a mortgage; recovery was not allowed, the court using the following language: "There is no averment in the declaration that the recorder had knowledge that such receipt was a forgery, or in any way acted maliciously or corruptly. There is, therefore, nothing in this case to take it out of the operation of the ordinary rule, that an officer acting within the scope of his duty, is responsible only for an injury resulting from a corrupt motive. It is the duty of the recorder to enter of record all deeds, mortgages, and other instruments of writing, required by law to be recorded, and which are presented to him for that purpose. It is not his duty to determine the validity of such instruments as may be presented for record, or to ascertain whether they be genuine or forged. But even if it were, and he should act honestly and fairly, according to the best of his ability, he would not be responsible. Yet, undoubtedly, if regardless of his duty, he should willfully and maliciously, with full knowledge, enter a false and forged instrument upon record, whereby some person was misled and injured, he would be responsible."

**b. Failure to Keep Index.**—Of equal importance with the recording of instruments is the keeping of an index thereof, as without it the records themselves would be practically useless; and a defective or incorrect index is of as little avail as none. Therefore, where the recorder fails to index a conveyance, and relying upon it, a party is misled to his injury, he may recover from the officer for his nonperformance: *Gordon v. Stanley*, 108 La. 182, 32 South. 531; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Schell v. Stein*, 76 Pa. St. 398, 18 Am. Rep. 416; *Johnson v. Brice*, 102 Wis. 575, 78 N. W. 1086. Where the officer kept a special index for the chattel mortgage record, and failed to enter a mortgage therein, the fact that he also kept a file index, in which the mortgage was entered, will not excuse him: *Morton v. Smith* (Tex. Civ. App.), 44 S. W. 683. So where by statute the county recorder is made liable to the person injured thereby for failure to enter a recorded mortgage in the general index, until after the volume in which he is engaged in recording such instruments is completed, he is not relieved from liability, although he has recorded the mortgage in the appropriate volume and indexed it therein: *Reeder v. State*, 98 Ind. 114. Where, under a statute, a register of deeds is not civilly liable for his failure to keep an index, unless willful, if inexcusable and gross neglect is shown, it will be presumed that he acted willfully, though a deliberate purpose to injure cannot be shown: *Maxwell v. Stuart*, 99 Tenn. 409, 42 S. W. 34. An Iowa statute provides that all instruments filed for record be indexed "forthwith." Under that statute the court held that a lapse of sixteen hours between the filing and indexing of a document established a *prima facie* case of negligence, in favor of one injured thereby; and if it should appear that it could have been indexed during regular business hours, and so prevent damage to the plaintiff, negligence

is established: *First Nat. Bank v. Clements*, 87 Iowa, 542, 54 N. W. 197.

**c. Searching Titles.**—There is sometimes imposed upon recorders the duty of searching titles and giving certificates in relation thereto. Where, in a certificate of mortgages furnished by him, the recorder omits to set forth a mortgage, and one is injured thereby, he is liable: *Sauvinet v. Landreaux*, 1 La. Ann. 219; *Houseman v. Girard etc. Assn.*, 81 Pa. St. 256; but in *Wood v. Ruland*, 10 Mo. 143, it was held that he was not liable for giving a false certificate, unless it was fraudulently given, or with a knowledge of its falsity. The register of deeds, in *Van Schaick v. Sigel*, 58 How. Pr. (N. Y.) 211, 60 How. Pr. 122, was held answerable for all errors and inaccuracies made in a search of title, and the fact that the party, in making requisition at the register's office, designated a certain clerk whom he desired to make the search, did not render such clerk his agent, so as to release the register from liability, it being a mere matter of accommodation. If the recorder omits a mortgage in making a search, upon the assurance that it should be satisfied, and a loss results, he is liable: *Peabody etc. Assn. v. Houseman*, 89 Pa. St. 261, 33 Am. Rep. 757. Where the clerk of a court made a false certificate as to liens, and received a fee of twenty-five cents therefor, he erroneously supposing it was his duty to make such certificate, he was held not liable if he acted fairly, using ordinary care and judgment: *Mallory v. Ferguson*, 50 Kan. 685, 32 Pac. 410.

**d. In Whose Favor Right of Action Accrues.**—In order to maintain an action against a recorder, or like officer, for failure to keep an index, it must appear that such neglect was the cause of the injury: *Hunter v. Windsor*, 24 Vt. 327; and it furnishes no cause of action in favor of one who never examined the records, and whose want of knowledge respecting them was not attributable to such defect in the index: *Lyman v. Edgerton*, 29 Vt. 305, 70 Amr. Dec. 415. See, also, *Crews v. Taylor*, 56 Tex. 461. For neglect in making a search of title, in general, the officer is liable only to the person for whom it is made, and so, where a third person to whom he owes no duty, relies upon it to his injury, he cannot recover: *Day v. Reynolds*, 23 Hun, 131; not even though he be the assignee or alienee of the party procuring the search: *Houseman v. Girard etc. Assn.*, 81 Pa. St. 256. The reasons given therefor are as follows: "The officer owes a single duty, which is to him who employs him to search and certify. If a new duty to another arises, it must be because of a new demand and a new privity. If without this new privity, successive liabilities can arise to others, the cause of action necessarily changes, both as to the time of its origin and the measure of the loss; and thus the statutory limitation as to official bonds will be postponed from time to time, and a variable standard of recovery arises with each succeeding claimant who holds the certificate. This is not only harsh and unjust to the officer, whose liability is thus made to continue onward without new compensation,



or a fresh search. A fresh search may reveal the omitted encumbrance, and thus give the officer a locus poenitentiae, as well as any equivalent compensation for the new risk to be assumed": *Siewers v. Commonwealth*, 87 Pa. St. 15. In that case, however, the officer reaffirmed the correctness of a search previously made to a third person, and it was held a republication and renewal of the certificate, so that he became liable as for an original search.

The vendee of a purchaser at a sheriff's sale, though expressly subrogated to all the rights acquired by the vendor under the sale, has no right of action against the recorder of mortgages for having given an imperfect and erroneous certificate, whereby his vendor was induced to purchase the property charged with an encumbrance not made known at the time of sale. The action in such case is a personal one, and the purchaser at the sheriff's sale alone can maintain it, as it is not in the nature of a real action, following the land: *Morano v. Shaw*, 23 La. Ann. 379. See, also, *Smith v. Moore*, 9 Rob. (La.) 65. The right of action which the plaintiff in a judgment has against a clerk for not properly indexing a judgment, is assignable; but a simple assignment of the judgment does not carry with it the right of action for failure to properly index it: *Redmond v. Staton*, 116 N. C. 140, 21 S. E. 186. Where a public officer knowingly makes a false record, and a person is injured in a transaction, by reason of the fact that his agent, charged with the whole business pertaining to the transaction, is deceived by the record, the law will, in the absence of evidence to the contrary, treat the principal as deceived, and allow him to recover: *Perkins v. Evans*, 61 Iowa, 35, 15 N. W. 584.

Where a register of deeds issues a marriage license to a minor without the parent's consent, he becomes personally liable to him for non-performance of duty: *Holt v. McLean*, 75 N. C. 347; and an averment that the complainant is the parent of the child, that the defendant was the officer and issued a license to his child, then being a minor, without the parent's consent, states a good cause of action: *Hilboldt v. Caraker*, 41 Ill. App. 595.

Money illegally exacted by a register before he will permit an inspection of the index to the records in his charge may be recovered back, and he becomes personally responsible: *Townshend v. Dyckman*, 2 E. D. Smith (N. Y.), 224. Under an Alabama statute, an action against a probate judge for charging an unlawful fee for recording an instrument can only be maintained by the party aggrieved: *Lee v. Lide*, 111 Ala. 126, 20 South. 410.

**e. Damages Recoverable.**—Where an officer makes a false certificate as to the nonexistence of liens, he is not liable if no damage arises: *United States etc. Pump Co. v. Linville*, 43 Kan. 455, 23 Pac. 597; likewise where no harm results from a failure to index a judgment: *Darden v. Blount*, 126 N. C. 247, 35 S. E. 479.

A recorder is liable only for the actual damage caused by his neglect, and in the absence of any showing of loss attributable thereto,



nominal damages only will be allowed; so where he receives a deed reserving a lien of five hundred dollars, and records it as for two hundred, unless the plaintiff can prove that he cannot collect the full amount of the lien from the person who assumed its judgment, he can recover no more than nominal damages: *State v. Davis*, 117 Ind. 307, 20 N. E. 159. And a mortgagee cannot maintain an action against such officer for the mere act of erroneously erasing a mortgage, where no attempt is made to enforce it; as the act of the recorder could not destroy the mortgage, even against an innocent purchaser who had bought on the faith of a certificate of there being no mortgage on the property, he is liable to the mortgagee only for such damage as results from his recourse against the mortgaged property being rendered more difficult and expensive: *Macarty v. Landreaux*, 8 Rob. (La.) 130. The loss must be the direct consequence of the error. Therefore, where an owner of property desires to procure a loan of money thereon, and in a search of the title a judgment is overlooked, upon which the premises are afterward sold and the owner compelled to pay four hundred dollars to settle the matter, the recorder is not liable as the loss is due, not to the recorder's error, but to the nonpayment of the judgment: *Kimball v. Connolly*, 2 Abb. Dec. (N. Y.) 504, 33 How. Pr. 247. Nor is he responsible in damages to a purchaser at a sheriff's sale, on account of his false certificate, that the title to the land sold was in the defendant in execution, when the purchaser ought not to have been misled by the certificate, and when his own chain of title afforded him the means of knowing that he held previously a title good as against the one sold: *Palfrey v. Marigny*, 10 La. Ann. 283.

In an action on the case against a recorder for a false certificate of search, in the absence of fraud, the statute of limitations begins to run from the time the search is given, and not when the damage arises; and the fact that the party paying for the search did not know of its falsity for six years makes no difference, as the cause of action is the issuing of the false certificate: *Owen v. Western Sav. Fund*, 97 Pa. St. 47, 39 Am. Rep. 794.

#### V. Clerks of Court, County Clerks and Prothonotaries.

a. **Injury and Loss.**—Where a public officer fails to discharge a duty imposed upon him by statute, while it may not vitiate the proceedings as to third persons, it will nevertheless render him liable to any person injured by such failure; so, where the clerk of a court omits to make out the docket of causes as required by law, and damage results, he must be held responsible therefor: *Brown v. Lester*, 21 Miss. (13 Smedes & M.) 392. The plaintiff, of course, must show that his loss was due to the clerk's neglect, or he cannot recover: *Symms v. Cutter* (Kan.), 59 Pac. 671; *Blossom v. Barry*, 1 Lans. (N. Y.) 190. See, also, *Eslava v. Jones*, 83 Ala. 139, 3 Am. St. Rep. 699, 3 South. 317.

b. **Failure to Enter, or Mistake in Entering Judgment.**—Where, due to the clerk's neglect, a judgment is not entered, and a person is

injured thereby, he is answerable to him in damages: *Planters' Bank v. Conger*, 20 Miss. (12 Smedes & M.) 527; *Coyne v. Souther*, 61 Pa. St. 455. So, where a statute provides that every clerk neglecting to enter judgment shall be liable to any person injured by such neglect, this gives a bona fide purchaser of real estate, against which a judgment lien existed, but which the clerk failed to enter on the judgment docket, a right of action for the amount lost: *Johnson v. Schloesser*, 146 Ind. 509, 58 Am. St. Rep. 367, 45 N. E. 702. In ascertaining the amount of a judgment, a clerk or prothonotary acts in an official capacity, and is responsible for an erroneous entry of the same: *Saylor v. Commonwealth (Pa.)*, 5 Atl. 227; but such officer is not liable for entering up judgment for the return of property in a replevin suit, upon receipt of a certificate "plaintiff nonsuit" from the court, although such a judgment may not be the necessary result of a nonsuit. *Hoeffner v. Stratton*, 57 Me. 360, in which case it is said: "The defendant's pleadings expressly averred that the property replevied was not the property of the plaintiff. The burden of proof was, therefore, upon the plaintiff to prove his title. Failing so to do, he must necessarily fail in his suit. Failing in his suit upon such a plea and such an issue, the defendant's right to a judgment for damages, and for costs, and for a return, was a conclusion of law, and rightfully made up by the clerk upon receipt of the certificate from the law court."

c. **Failure to Issue Execution, or Mistake Therein.**—When the clerk fails to issue execution, after the plaintiff is rightfully entitled thereto, and injury arises from his nonfeasance, as the insolvency of the defendant, he is liable: *State v. Merritt*, 65 N. C. 558; and where he refuses to issue an execution, it is held in *Gooch v. Gregory*, 65 N. C. 142, that the plaintiff may obtain a rule on the clerk as an officer of the court to compel him to perform his duty or be attached for contempt, or else sue him on his bond. Where, however, the allegations of a bill are not sufficient to justify the issuance of an attachment, so that it would be void or voidable or a decree based thereon reversible, so that there could be no valid levy thereunder, the clerk, for failure to issue the writ, is liable for nominal damages only, as it would not have been authorized by law and be of no advantage to the plaintiff: *Alston v. Sharp*, 70 Tenn. (2 Lea) 515. In that case, it is held that the plaintiff need not affirmatively prove he could collect his debt, where wrongfully deprived of mesne or final process, as is the English rule, but that such facts may be shown in defense by the officer, for "in such cases, public policy favoring active performance of duty would be best subserved by requiring the officer to show, that notwithstanding his neglect of duty, the plaintiff was not injured, thus requiring the officer to be responsible for his negligence, when that is established, unless he can show no damage has resulted from such neglect."

A want of care on the part of the clerk may render him liable to either the plaintiff or defendant in the execution, as where he

wrongfully issues execution under which the property of a party is sold, in which case trespass will lie: *Coltraine v. McCain*, 14 N. C. (3 Dev.) 308, 24 Am. Dec. 256, or where he issues the writ otherwise than as provided by law, as not requiring the certificate from the justice before whom the original judgment was entered, when such is the law: *Frankem v. Trimble*, 5 Pa. St. 520. On the other hand, where the clerk issues the writ for too small an amount, he is liable for the difference between that sum and the true amount: *Russell v. Clayton* 3 Call (Va.), 41. So, where the judgment note contains a waiver of exemption, and the prothonotary, in issuing a *fieri facias* upon the judgment entered on the note neglects to observe such waiver in the writ, and the defendant claims the exemption and nothing is realized on execution, the officer is liable for the loss, it being his duty to inspect the judgment and see that the writ conforms thereto: *Wilson v. Arnold*, 172 Pa. St. 264, 33 Atl. 552. Where the court erroneously quashes an execution because of a mistake of the clerk in fixing the return day, the latter is not responsible to another defendant in the execution, a surety, for loss incurred thereby, because the principal made an assignment for the benefit of his creditors before the issuance of the second execution, and the surety had to pay: *Goode v. Miller*, 78 Ky. 235.

In an action against the clerk of a court for indorsing on an execution credits to the plaintiff's injury, it must state that such indorsements were made without the order or consent of the plaintiff, or it is bad: *Munroe v. Webb*, 4 Munf. (Va.) 73.

**d. Loss on Appeal, or of Right to Appeal.**—Where an appellant loses his right of appeal through the failure of the clerk to furnish a bill of exceptions within the proper time, the clerk must respond in damages. In such a case, the complaint should state facts to show that the judgment would have been reversed, and a mere statement of belief that it would, is bad: *Houston v. Wandeloehr*, 12 Ky. Law Rep. 345, 14 S. W. 345. And where the clerk fails to copy the return of the sheriff upon the summons, whereby the judgment is reversed and the party loses his debt, it also gives a right of action against him: *Clark v. Wilcox*, 31 Tex. 322. As to the damages in such cases, see *Baltimore etc. R. Co. v. Weedon*, 78 Fed. 581, 24 C. C. A. 249.

**e. Taking Illegal Fees.**—Where a clerk takes fees which he has no right to take, they may be recovered back. "Whenever a payment made in ignorance of the law is induced by the fraud or imposition of the other party, and especially if the parties are not upon an equal footing, an action to recover it back is maintainable: *Stover v. Poole*, 67 Me. 217; *Silliman v. Wing*, 7 Hill, 159; *Bank of United States v. Daniel*, 12 Pet. 32. This court has declared in *Freeman v. Curtis*, 51 Me. 140, and in *Jordan v. Stevens*, 51 Me. 78, that when one, who himself knows the law, and knows another to be ignorant of it, takes advantage of his ignorance, it may be regarded as fraud. His very silence may be fraudulent: *Downing v.*

Dearborn, 77 Me. 457, 1 Atl. 407. For a public officer, whose fees, by law, are to be paid by the city, and are paid by the city to receive fees to which he knows he is not entitled and which he knows are being paid to him by a party ignorant of the law who would not pay it if he did know the law, and not to inform him that he was not bound to pay, is fraudulent; and such officer should restore the money, which he cannot conscientiously retain. To hold otherwise would be a reproach to the law": *Marcotte v. Allen*, 91 Me. 74, 39 Atl. 346. And where he exacts the money by duress, knowing it to be illegal, it need not be paid under protest in order to recover it back: *Meek v. McClure*, 49 Cal. 623. A statute providing that the person from whom a public officer has extorted money shall have a right of action against him creates a personal liability: *State v. Bagby* (Ind.), 67 N. E. 519; but where he asks fees for twenty miles, and in fact travels nineteen miles, if it is not shown that the overcharge was knowingly made, he is not liable: *Weightman v. Jones*, 73 Vt. 353, 50 Atl. 1101. In *Cobbey v. Burks*, 11 Neb. 157, 38 Am. Rep. 364, 8 N. W. 386, it was held that mistake or ignorance without corrupt intent was no defense to an action for a penalty given by statute for taking larger fees than legally allowed.

A motion does not lie against the clerk of a court on behalf of the defendant in a criminal case to recover costs alleged to have been illegally collected by him, where the defendants voluntarily paid the costs and made no demand for their return till the clerk had paid them into the public treasury: *State v. Oden*, 101 Tenn. 669, 49 S. W. 750.

The questions whether errors in entering up fees in the book of the clerk was intentional, and for wrongfully oppressing the plaintiff and extorting money from him are for the jury: *Hurd v. Atkins*, 1 Colo. App. 449, 29 Pac. 528. But where the clerk is sued for overtaxing costs, the presumption that he did his duty in that matter is overcome by a judgment of the circuit court retaxing them: *State v. Hollenbeck*, 68 Mo. App. 366. Where an action is brought under a statute for taking illegal fees, the receipt of several items of illegal fees from the same person as one transaction constitutes but one cause of action: *Lydick v. Palmquist*, 31 Neb. 300, 47 N. W. 918. Where the statute allows a forfeiture of fifty dollars for taking illegal fees, regardless of the amount paid, it is not unconstitutional: *Graham v. Kibble*, 9 Neb. 182, 2 N. W. 455.

f. **Refusal to Pay Out Money.**—If, in good faith, a clerk improperly refuses to pay out money, he is liable therefor: *Logan v. McCahan*, 102 Iowa, 241, 71 N. W. 252. And where he received a fund from his predecessor which had been wrongfully retained in the latter's custody, while not chargeable with his disobedience, he is still liable for interest on the fund which he actually received after taking it into custody: *Baltimore etc. R. Co. v. Gaulter*, 165 Ill. 233, 46 N. E. 256, reversing 60 Ill. App. 647. If a clerk withholds part of a court fund to which he is not entitled, on motion of the parties



who are entitled thereto, the court may require him to account, and this, though his term of office has expired: *Baltimore etc. R. Co. v. Gaulter*, 165 Ill. 233, 46 N. E. 256.

**g. Approving Bonds.**

**1. Liability for Negligence.**—The act of a clerk in passing on the sufficiency of a bond is not judicial, and for all damage occasioned by reason of his approving an insufficient bond, he is liable: *Hubbard v. Switzer*, 47 Iowa, 681. In approving bonds he is required to exercise care and diligence, such as an ordinarily careful and prudent man exercises in transactions of like importance, and if he does so, is not liable: *Marshall, Field & Co. v. Wallace*, 89 Iowa, 597, 57 N. W. 303; even if the security subsequently proves to be insufficient: *Brook v. Hopkins*, 5 Neb. 231; as he is not an insurer of the bond: *Santee River Co. v. Webster*, 23 R. I. 599, 51 Atl. 218. It cannot be held as a matter of law, however, that the clerk in approving the bond, was required to do nothing more than demand of the surety justification, and that he made oral statements of the value of his real estate, and the amount of encumbrances thereon, in order to relieve him from the imputation of negligence: *Haverly v. McClelland*, 57 Iowa, 182, 10 N. W. 342.

Case lies against the clerk for wrongfully approving an appeal bond which provides a penalty less than that prescribed by law: *Billings v. Lafferty*, 31 Ill. 318. In *Ward v. Buell*, 18 Ind. 104, 81 Am. Dec. 349, the officer was held liable for the deficiency for taking a bond for a less amount than that required, the bond being good as to the amount taken. By approving the security on an appeal bond which omits the name of one of the appellees, and sending the same to the appellate court, no question as to the sufficiency of the sureties arising, the clerk does not become liable for the omission, as he can only approve the sufficiency of the security on appeal, and in no other respect is its sufficiency left to his determination; if the bond is insufficient, the clerk's holding it to be good does not make it insufficient: *People v. Leaton*, 121 Ill. 666, 13 N. E. 241.

Where it is for the court, and not the clerk, to approve guardianship bonds the latter is not liable for taking and recording a bond filed by the guardian without surety: *Reno v. McCully*, 66 Iowa, 730, 24 N. W. 530. But where he takes one person as security on an appeal bond, which he has no right to do, and the probate judge directs him to issue the writ as prayed, the taking of the bond with but one person as surety is *coram non judice*, and affords him no protection: *Buckley v. Wilson*, 56 Ala. 393. Where the clerk certified that the person whose name appeared in the bond as surety was worth a certain specified amount, and the bond was accepted, it was held that the clerk did not certify to the genuineness of the surety's signature, and if it was forged he incurred no liability: *Bringolf v. Burt*, 44 Iowa, 184. Where the bond was not conditioned so as to cover the damages sustained by the plaintiff, the fact that the clerk took insolvent sureties on the bond furnishes no ground of action



if such damages occurred: *Wade v. Miller*, 104 Ala. 604, 16 South. 517. An interesting case is *Williams v. Hart*, 17 Ala. 102, in which the defendant, in order to supersede a judgment against him, tendered the clerk sufficient security, and the clerk allowed the bond to be signed in blank, with the understanding that it might afterward be filled up. Before this was done, however, the sureties revoked the authority, but the clerk, acting under a mistaken idea of law, nevertheless filled the bond up and certified it as valid to the supreme court, which affirmed the judgment against the defendant. The sureties having obtained an injunction to relieve themselves from the judgment, the clerk was held liable to the plaintiff for the amount of the original judgment, with interest, and the costs attendant upon the chancery suit, instituted to test the legality of his act in filling out the bond. For clerk's failure to collect a bond, see *Watts v. Robson*, 6 Tex. 206.

**2. Allegations.**—The fact that a statute requires the clerk to give bonds for the faithful performance of his duties does not impair the common-law right to sue him in an action on the case for negligence; so, where he fails to take security, as required by law, he is responsible in an action on the case to the same extent as the security, if taken, would have been: *Pass v. Dibrell*, 16 Tenn. (8 Yerg.) 470. In such action against a clerk for approving defective bond on appeal, an averment that he did so "contriving, and unlawfully and unjustly intending to injure the plaintiff, and to deprive him of the benefit of" a judgment which he had obtained on the appeal, is a sufficient allegation that the act was done willfully and maliciously: *Billings v. Lafferty*, 31 Ill. 318. And where he is sued for taking insufficient security for costs under a statute, it must be alleged that he took no security, or that he took insufficient security, knowing it to be such: *Wright v. Wheeler*, 30 N. C. (8 Ired.) 184.

#### **h. Defenses.**

**1. Negligence, Sickness, Ignorance.**—The carelessness of a clerk will not avail him as a defense for failure to perform a duty incumbent upon him, and it is no excuse that he has misplaced the papers so that they cannot be found upon a reasonable examination: *Rosenthal v. Davenport*, 38 Minn. 543, 38 N. W. 618. So, where he is sued for failure to issue execution, he cannot defend on the ground that the papers were lost, and that it was customary to permit attorneys to take the records from the office and he was powerless to prevent it; his duty is to exercise the diligence of a prudent man in the safekeeping of valuable papers: *McFarland v. Burton*, 89 Ky. 294, 12 S. W. 336. Nor is sickness of the clerk, and insufficiency of his deputy an excuse for nonfeasance. If he was not able to do the work of his office in the manner and within the time required by law, it was his plain duty to employ competent help. For nonperformance of official duty imposed by the plain provisions of a statute within a reasonable time after it is required to be performed, the law knows not, and will not tolerate the excuse of want of time or

the want of competent assistance, when such duty may be performed by a deputy: *Randol v. Garoutte*, 78 Mo. App. 609. When sued for taking the notes of insolvent persons for land sold on partition, the fact that the clerk did not know they were insolvent is no excuse, as it was his duty to inform himself: *Dean v. Hale*, 75 Tenn. (7 Lea) 613.

**2. Contributory Negligence.**—Contributory negligence may be a good defense to a clerk of a court, and where but for the negligence of the party complaining the injury would not have occurred, the clerk is not liable: *Parks v. Davis*, 16 Iowa, 20. So, if one recovers judgment and the clerk prepares the writ, but it is not called for, and in the meantime another party obtains a writ against the same person which is served first and thus procures priority, and the debt is lost to the former, the clerk is not liable: *Lick v. Madden*, 36 Cal. 208, 95 Am. Dec. 175. Where, however, the clerk fails to send up papers, as is his duty, and a loss occurs, he cannot claim that the failure of the party to whom the duty was owing to mandamus the clerk to send up the papers was such negligence as to prevent a recovery for his default: *Collins v. McDaniel*, 66 Ga. 203. Nor is the fact that the plaintiff did not give attention to the clerk's performance of his duty a valid excuse: *Baltimore etc. R. Co. v. Weedon*, 78 Fed. 584, 24 C. C. A. 249.

**3. Order of Court.**—The failure on the part of a clerk to perform his duty may be excused by the act of the court, as where an order granting additional time is made, the act need not be performed within the statutory time: *Davidson v. Wiley*, 31 Ala. 452. So, a master in equity is not amenable to a suit for error in judgment in taking security on a sale of property, and where the court specifically instructs him, he is bound to pursue the instructions strictly: *Fenwick v. Gibbs*, 2 Desaus. Eq. (S. C.) 629. Where the clerk makes an erroneous order, and it is afterward approved by the judge, he is held not liable: *Commonwealth v. Thompson*, 65 Ky. (2 Bush) 559, where the rule in such cases is stated by the court as follows: "It seems to us that, in the absence of fraud, culpable negligence, or willful wrong, on the part of the clerk, the orders and judgments drawn by him although erroneous and prejudicial to the rights of parties, are, when approved and signed by the court, to be presumed to be the acts of the court rather than the clerk, for which, for obvious reasons, and on well-settled principles no right of action exists." The distinction is made in *Kinnison v. Carpenter*, 72 Ky. (9 Bush) 599, between the acts of a clerk, when acting under direction of a judge, and those which he is required to perform without regard to the dictation of a superior. In the former case, as where it is his duty to draft orders for the transaction of court business, and submit them to him for his approval, he will be presumed to have acted under the sanction of the judge, and be not liable, except where he refuses to discharge his duties when requested by the judge, or fraudulently colludes with him; in the latter case, he will be liable.

1. **Indexing Documents.**—Where the clerk is ex-officio recorder, or it is part of his duty to keep and index documents, and he fails or neglects to do so, for his liability see Registers of Deed and Records, IV, B, herein.

## VI. Sheriffs, Constables, and Marshals.

a. **Importance of the Office.**—If the number of cases upon the subject is any criterion, the sheriff is by far the most important ministerial officer. Execution is, of course, the sole end of every action at law, and it is, therefore, but natural that innumerable questions as to the liability of sheriffs should have arisen in dealing therewith, he being the only officer empowered to carry it into effect. This is well expressed in *Jacobs v. McDonald*, 8 Mo. 565, where it is said: "It would be very hard if a person, obliged to bring a suit, should suffer by the neglect or misconduct of those employed by the law to perform acts which can be done by them alone."

b. **Acting Under Process.**—In serving process it may be laid down as the law that if the writ is fair upon its face, and no want of jurisdiction exists, the officer is protected for acting under it: *Merchant v. Bothwell*, 60 Mo. App. 341; *O'Briant v. Wilkerson* (N. C.), 30 S. E. 126. If, however, he has knowledge of the want of jurisdiction in the tribunal issuing it, he is liable for executing it: *Sprague v. Birchard*, 1 Wis. 457, 60 Am. Dec. 393. A warrant issued by an inferior magistrate must show upon its face the legal authority for its issuance: *Jacques v. Parks*, 96 Me. 268, 52 Atl. 763; but where the court had jurisdiction, the officer need not examine into the validity of the proceedings: *Lattin v. Smith*, 1 Ill. (Breese) 361. In *Brichman v. Ross*, 67 Cal. 601, 8 Pac. 316, the rule is laid down in the following words: "Ministerial officers are presumed to know the law, and are bound at their peril to know the general jurisdiction of the courts, whose process they are called upon to enforce, and if they execute process which the court has no jurisdiction to issue, they are liable: *Freeman on Executions*, sec. 100. If, however, a writ is issued by the proper officer, in due form, in a case where he has jurisdiction and authority to exercise jurisdiction over the subject matter of the writ, and there is nothing on the face of the writ showing it to be illegal, the officer to whom it is directed, and whose duty it is to execute it, may do so, and justify his acts thereunder by producing the writ, although from some cause not apparent on the face of the writ, the whole proceeding is irregular or void: *Freeman on Executions*, sec. 101, and cases cited. The rule is the same in case of process issuing out of courts of limited jurisdiction."

### c. Failure to Levy.

1. **Liability Therefor.**—It is universally held that where the sheriff, without any excuse, fails to levy upon the goods of the defendant, he is responsible in damages: *State v. Sandlin*, 44 Ind. 504; *Cox v. Currier*, 62 Iowa, 551, 17 N. W. 767; *Emanuel v. Cocke*, 6 Dana

(Ky.), 212; Commonwealth v. Begley, 23 Ky. Law Rep. 1985, 66 S. W. 754; Platt v. Sherry, 7 Wend. 236; O'Bannon v. Saunders, 24 Gratt. (Va.) 138; Ronald v. Bentley, 4 Hen. & M. (Va.) 461.

2. **Defenses.**—It is held in Commonwealth v. O'Cull, 7 J. J. Marsh (Ky.) 149, 23 Am. Dec. 393, that the officer must obey irregular process, and its irregularity is no bar for a failure to do so, but may be given in mitigation of damages. Where, however, the writ is not void upon its face, but is so in fact, as where the court has no jurisdiction, or the judgment is void, he is excused from levying: Newburg v. Munshower, 29 Ohio St. 617, 23 Am. Rep. 769; Hill v. Wait, 5 Vt. 124. Nor is he liable for not executing a fieri facias which has been stayed by order of the judge: Commonwealth v. Magee, 8 Pa. St. 240, 44 Am. Dec. 509. Where the execution issued upon a recognizance, and the former misrecited the latter both as to amount and time of entering into it, the officer was held not liable for failing to serve it: Albee v. Ward, 8 Mass. 79. It is a good defense to prove paramount title to the goods in another: Dobbs v. Justices etc., 17 Ga. 624; and the mere fact of his levying on the property as defendant's does not estop him from denying that it is his, as his return is only prima facie against him: Cassell v. Williams, 12 Ill. 387. In State v. Neff, 74 Ind. 146, it was held that the insolvency of the defendant was a bar to the action for failure to levy.

In Derby Bank v. Landon, 2 Conn. 417, the creditor agreed to suspend collection of the money on execution for a specified time, but before the expiration thereof, he gave the writ into the hands of the sheriff, who neglected to levy; when sued, he set up the agreement, but it was held a bad defense: See, also, Nye v. Kellam, 19 Vt. 548. Nor is it a defense that the officer was told by the agent of the original plaintiff that the matter was settled where the record showed the writ to have been assigned to another: Gregory v. Waters, 19 Ga. 71. He is not excused because the corporation holding the money refused to deliver it to him, and he could not take manual possession of it: Howe v. White, 49 Cal. 658. Nor where he thought that the property would not pay the expenses of sale: In re Mowry, 12 Wis. 52. And the fact that he was informed that the property in the defendant's possession was not his is no excuse; and if he wishes to set up that it was not subject to levy, the burden is on him: People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418. If the sheriff fails to execute a capias ad satisfaciendum, it is no defense that the defendant therein had already been arrested under another, and had given a bond for his appearance to take the benefit of the honest debtors' act: Porter v. Pierce, 19 Ga. 268. And where he holds several writs against the same defendant, the fact that a claim is interposed against one of them does not relieve him from liability for not proceeding with the remainder: Brown v. McCrary, 30 Ga. 878. The refusal of an Indian agent to consent to the entry by a sheriff on the reservation to levy execution on the property of one not an Indian does not ex-

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cuse the sheriff from making the levy; nor the advice of the United States district attorney that he had no right to enter: *Stiff v. McLaughlin*, 19 Mont. 300, 48 Pac. 232. The sheriff cannot defend on the ground that he had no knowledge of the debtor's having any property, and that the plaintiff did not point out such property to him: *Hargrave v. Penrod*, 1 Ill. 401, 12 Am. Dec. 201; but where the sheriff applies to the plaintiff's attorney for information as to the defendant's effects, and he has knowledge thereof but withholds it from the officer, the latter is exonerated for his failure to levy: *Batte v. Chandler*, 53 Tex. 613. Sickness of the officer is no excuse: *Freudenstein v. McNeir*, 81 Ill. 208.

When sued for failure to make money on execution the officer can excuse himself by showing that the defendant had no property out of which the money could rightfully be made: *Mason v. Watts*, 7 Ala. 703; *Bowman v. Cornell*, 39 Barb. 69; or that after execution he was perpetually enjoined, although the writ was in his hands several years before the decree was made, the judgment thus becoming inoperative and the same as if never existing: *McCall v. McRae*, 10 Ala. 313. But it is no excuse for the sheriff to aver that the defendants notified him of their intention to file a bill for an injunction against the execution: *Dawson v. Merchants' Bank*, 30 Ga. 664. Press of business is not a good defense: *Hallett v. Lee*, 3 Ala. 28; but contributory negligence on the part of the plaintiff will allow a recovery only for such damage as was sustained on account of the sheriff's negligence alone: *Palmer v. Gallup*, 16 Conn. 555.

Where the officer, who has returned an attachment of cattle and delivered them to a third person for safekeeping, is sued for neglect in not procuring satisfaction of execution, he cannot show, either in bar of the action or in mitigation of damages, that the expense of keeping the cattle between the attachment and execution would have exceeded the value of the cattle: *Tyler v. Ulmer*, 12 Mass. 162. Where the execution remains in the hands of the sheriff unexecuted, until he is re-elected, it becomes his duty to execute the writ and make the return, and for a failure to do so he is liable: *State v. Roberts*, 12 N. J. L. 114, 21 Am. Dec. 62.

As to the effect of the giving or refusal of indemnity upon the sheriff's liability for failing to act, see *Indemnity*, VI, e, 1, herein.

**3. Diligence Required in Executing Process.**—In executing process a sheriff need only make reasonable efforts, and is not bound to the utmost diligence: *Commonwealth v. Gill*, 14 B. Mon. (Ky.) 20; that is, such skill and diligence as a reasonable man would exercise: *Crosby v. Hungerford*, 59 Iowa, 712. What reasonable diligence is depends upon the particular facts of each case, and he need not start on the instant he receives process, without regard to anything else: *Whitney v. Butterfield*, 13 Cal. 335, 73 Am. Dec. 384. "Without delay" and "immediately" in this connection mean using all reasonable endeavors seasonably to execute it; and where a half-

holiday law relieves an officer from the duty of keeping his office open on such days, it does not relieve him from the obligation of performing any official duties which may be discharged outside of his office: *Dailey v. Fenton*, 62 N. Y. Supp. 337, 47 App. Div. 418. What is a reasonable time for the purpose of executing process is a question for the jury: *State v. Gemmill*, 1 Houst. (Del.) 9; but where no diligence is shown the court need give no instructions on the point: *Henry v. Commonwealth*, 107 Pa. St. 361.

If ordinary diligence is used in searching for property to levy on, a return of *nulla bona* does not render the officer liable: *Barnes v. Thompson*, 2 Swan (Tenn.), 313; and the mere fact that the defendant had property does not make him responsible in damages: *Fisher v. Gordon*, 8 Mo. 386; but where he returns *nulla bona* upon a mere general report that the debtor had no property, and it turns out that he had, this is no diligence; *Parks v. Alexander*, 7 Ired. (N. C.) 412. The presumption of diligence on the part of a sheriff in respect to a *feri facias* will not be overcome by proof that the defendant had real property which might have been levied on, where his title is not of record and there is nothing to show he was in actual possession, or that reasonable diligence would have disclosed such ownership: *Force v. Gardner*, 43 N. J. L. 417; nor is he bound to search the records: *Start v. Sherwin*, 1 Pick. (Mass.) 521; *Bacon v. Leonard*, 4 Pick. 277. Where a sheriff knew that a defendant against whom he had a writ would be at a particular place on a certain day on his way out of the state, and he shows no reason for not going there, it is negligence: *Jenkins v. Troutman*, 7 Jones (N. C.) 169, 75 Am. Dec. 459.

**4. Measure of Damages.**—The measure of damages for failure to execute process is the actual injury or loss sustained by reason thereof, and not necessarily the amount of the debt, and no more can be recovered from the officer than would have been realized if he had done his duty: *Palmer v. Gallup*, 16 Conn. 555; *Wakefield v. Moore*, 65 Ga. 268; *Commonwealth v. Lightfoot*, 7 B. Mon. (Ky.) 298; *Arnold v. Commonwealth*, 8 B. Mon. 109; *Marshall v. Simpson*, 13 La. Ann. 437.

For failure to levy, *prima facie* the damage is the amount of the judgment, interest, and costs; but the officer may show that a less sum only could have been realized by levy: *Robinson v. Schmidt*, 48 Tex. 13; and where the property was of no value, this will allow only nominal damages: *State v. Emmons*, 99 Ind. 452. The sheriff may show that the plaintiff in execution has been paid since judgment money not credited thereon, thus showing less injury to the plaintiff: *Wheeler v. Thomas*, 57 Ga. 161; and he may show defendant's insolvency, and that therefore nothing could be realized, but in such case the burden is upon the officer: *Murphy v. Troutman*, 50 N. C. (5 Jones) 379; *Jenkins v. Troutman*, 7 Jones, 169, 75 Am. Dec. 459. He may also set up that the property to be levied on was exempt: *Wilkins v. American etc. Co.*, 106 Ga. 182, 32 S.

E. 135; or that it belonged to someone else and so no damage accrued to the plaintiff: *Cowart v. Dunbar*, 56 Ga. 417. In *Gilbert v. Gallup*, 76 Ill. App. 526, the measure of damage for failure to levy on property is held to be the amount which it would have brought if publicly sold to the highest bidder; but the Vermont court holds that such an uncertain fluctuating price ought not to be the measure, but its cash value: *Wetherby v. Foster*, 5 Vt. 136.

While the officer may show the insolvency of the defendant in execution, he cannot show that he is still solvent: *Tyler v. Ulmer*, 12 Mass. 163, in which case the court clearly sets forth the reasons for not allowing it in the following language: "Indeed, it would be extremely mischievous to permit an officer to excuse himself, or even to alleviate the damages consequent upon a willful neglect of duty, by showing that the creditor may still, by a new process, or by a new execution, obtain satisfaction of his debt. The very fact, attempted to be used in mitigation of damages, aggravates the misconduct of the officer. For, if the debtor is able to pay, he ought not, under any pretext, to return the execution unsatisfied. But, if he chooses not to levy upon the property attached, he should in such case, obtain the money of the debtor, and pay it over to the creditor. Were he allowed to neglect his duty, and then justify himself, in whole or in part, by proving the debtor able to pay, a wide door would be opened to collusive practices between officers and debtors, and an execution, instead of being *finis et fructus legis*, would be but a troublesome and expensive formality."

While the officer may reduce the damages by showing that the defendant has no property: *Humphrey v. Hathorn*, 24 Barb. 278; he cannot introduce evidence that property in his possession was said not to be his, as being hearsay: *Robertson v. Beavers*, 3 Port. (Ala.) 385.

5. **Pleadings.**—To maintain an action against a sheriff for failure to levy execution, it must be shown that he had knowledge of property owned by the execution debtor subject to execution, and on which he could make a levy, or knowledge of such facts as should cause him to make exertions to find the property: *Taylor v. Wimer*, 30 Mo. 126; and when he is sued for not making money on execution, it is necessary to prove that the execution was placed in his hand, and while in his hands he had been requested to make the levy when in his power to do so, and he failed to do so: *Lyendecker v. Martin*, 36 Tex. 287. A complaint for failure to levy within the time required by statute, which does not allege that the sheriff was not otherwise directed by the plaintiff or his agent, is insufficient: *State v. Emmons*, 88 Ind. 279. Where the officer is directed to levy on the goods of the defendant, but commits the debtor to prison instead, trespass on the case will lie: *Platt v. Sherry*, 7 Wend. 236.

The statute of limitations commences to run when the sheriff neglects his duty and fails to make the proper levy: *Hall v. Tomlinson*, 5 Vt. 228. An officer sued for failure to seize property can-

not show that the property was in the possession of another officer by virtue of another writ, under the general issue: *Reilly v. Lewis*, (Tex. Civ. App.), 47 S. W. 552.

**d. Failure to Sell.**—A failure to sell after levy is as much a breach of official duty as neglecting to levy, and renders the officer liable: *Wilkins v. American etc. Co.*, 106 Ga. 182, 32 S. E. 135. A sheriff is bound to sell with reasonable diligence, and may not put off till the last day allowed by the writ, if the plaintiff is injured by such delay: *Janvier v. Vandever*, 3 Harr. (Del.) 29. So where the property was levied on, but the officer neglected to sell for six months and then the defendant obtained an injunction and prevented the collection of the writ, the officer was held liable and not allowed to plead the injunction as an excuse: *Neal v. Price*, 11 Ga. 297. Where a sheriff seized goods under a fieri facias, and then another such writ against the same defendant came to his hands, the bare reception of the latter was held to operate as a constructive levy upon the property seized upon the former, so as to render the sheriff liable for not selling the goods thereunder if the first levy were withdrawn: *Van Winkle v. Udall*, 1 Hill (N. Y.), 559. For failure to sell, the measure of damages is the actual injury sustained: *Brannon v. Barnes*, 111 Ga. 850, 36 S. E. 689.

A sheriff is bound to exercise reasonable care and judgment in the manner of his sales, so that the property levied on may be sold to the best advantage; if there is a failure of bidders, or circumstances are such that the price will be inadequate, he should adjourn the sale; his discretion in the matter of sale should be liberally construed in the absence of bad faith, yet he should be held responsible for clearly neglecting the proper exercise of it: *Todd v. Hoagland*, 36 N. J. L. 352. In the absence of directions from the plaintiff, the sheriff may sell the goods at public auction, and if there is no fraud nor neglect, he is not answerable although the goods brought an inadequate price: *Lynch v. Commonwealth*, 6 Watts (Pa.), 495, 31 Am. Dec. 490.

**e. Delay in Levying.**—It is the sheriff's duty to serve writs at the earliest practical moment, and for all the damage his delay causes he must answer: *Barnard v. Ward*, 9 Mass. 269; and it will not avail the officer as a plea that he was ignorant of any danger in delaying the execution of the writ: *Chapman v. Thornburg*, 17 Cal. 87, 76 Am. Dec. 571; nor is it a justification to an officer for neglecting to execute process that there are formal defects in the process, not rendering it void, though sufficient to cause it to be quashed or set aside on proper motion, by the party affected by it: *Chase v. Plymouth*, 20 Vt. 469, 50 Am. Dec. 52.

Where the sheriff is directed to levy on goods for a certain month, and he postpones it to a later month so that the defendant may get time to get an injunction, he is liable if injury results: *Hunter v. Phillips*, 56 Ga. 634; so where he delays the levy for six months, and the defendant dies, and his widow's dower right intervenes, he



is liable: *French v. Kemp*, 64 Ga. 749. A failure to act from October 7th to November 1st, no reason being assigned for the delay, is actionable: *Lindsay v. Armfield*, 3 Hawks (N. C.), 548, 14 Am. Dec. 603; as is also a delay of five days in serving the writ, where the defendant disposes of his property at the end of that time: *Elmore v. Hill*, 51 Wis. 365, 8 N. W. 240. A failure to execute a fieri facias for eight days, the officer living within ten miles of the debtor, is such a want of diligence as to make the officer liable: *Hearn v. Parker*, 52 N. C. (7 Jones) 150.

**f. Excessive Levy.**—While an excessive levy does not vitiate the title of the officer to the property levied on: *Brown v. Allen*, 3 Head (Tenn.), 429; where the officer willfully makes an excessive levy, it is as flagrant a wrong as levying on the excess without any process at all: *Hillard v. Wilson*, 65 Tex. 286; and trespass on the case will also lie: *Dezell v. Odell*, 3 Hill (N. Y.), 215, 38 Am. Dec. 628. As to remedy by motion see *Campan v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133.

The true rule as to making a levy is well expressed in *Dewitt v. Oppenheimer*, 51 Tex. 103, as follows: "The process in his hands being designed as a security for the plaintiff's debt, and not as an instrument of oppression to the debtor, he should on the one hand avoid making an insufficient levy, and on the other avoid making an excessive one; that in determining what should be a sufficient levy, so as to prevent accountability from negligence or a design to injure either of the parties interested, he should exercise a cautious and reasonable discretion, such as should influence the conduct of prudent and discreet men generally in the management of their own affairs; that, tested by this standard, if the levy is either insufficient or excessive, then he should be responsible in damages to the party injured. If, however, he comes up to this measure, then he should not be responsible, although damage in fact may have accrued to one or the other: *Cornelius v. Burford*, 28 Tex. 208, 91 Am. Dec. 309; *Harrison v. Harwood*, 31 Tex. 650; *Commonwealth v. Lightfoot*, 7 B. Mon. (Ky.) 298; *Lynch v. Commonwealth*, 6 Watts (Pa.), 495, 31 Am. Dec. 490; *Governor v. Carter*, 3 Hawks (N. C.), 328, 14 Am. Dec. 588; *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238; *Freeman on Executions*, sec. 253; *Shearman and Redfield on Negligence*, sec. 521. Although a certain amount of discretion must be left to the officer, depending to some extent upon the facts and circumstances of the particular case, yet as a general rule, established by many cases, the value of the property levied upon should be equal to the amount of the debt sought to be recovered, making a proper allowance for depreciation in value naturally incident to the property and depreciation in price as the usual effect of a forced sale, and, in addition, for costs and incidental expenses: *Griffin v. Ganaway*, 8 Ala. 625; *Freeman on Executions*, sec. 253."

Where the officer is guilty of a breach of good faith in making an excessive levy, he is liable to the defendant: *Jones v. Davis*, 2

Ala. 730; and his conduct and motives at the time of making the levy must be looked at in determining whether he acted lawfully: *Moulton v. Chadborne*, 31 Me. 152.

Where there is a great uncertainty as to the value of the property at the time of levying, and it is subsequently found out that its value is greatly in excess of the sum sued for, it does not follow that the levy is excessive: *Sexey v. Adkison*, 40 Cal. 408. If the property fails to bring the amount of the debt, the levy is not excessive: *Lynn v. Sisk*, 9 B. Mon. (Ky.) 135; *Ingram v. Belk*, 2 Strob. (S. C.) 207, 47 Am. Dec. 591; nor is it where the amount to be secured is sixty dollars and the goods attached are estimated at seventy-four: *Merrill v. Curtis*, 18 Me. 272. The following cases have been held to be excessive: Where the execution did not exceed thirty-five dollars, and the land seized was worth five hundred: *Banks v. Bales*, 16 Ind. 423; where the land levied on was appraised at eight hundred dollars, and the debt amounted to twenty-one dollars: *Cook v. Jenkins*, 30 Iowa, 452; where the property was worth eight hundred dollars and was sold on an execution for ten dollars and twenty-five cents: *Tiernan v. Wilson*, 6 Johns. Ch. 411. In *Silver v. McNiel*, 52 Mo. 518, the greatest difference in amount occurred, for there a steamboat worth forty thousand dollars was levied on to satisfy a debt of one hundred and nine dollars; and was, of course, held excessive.

Where the article or property is indivisible it may be attached, although beyond the value directed to be levied on: *Moulton v. Chadborne*, 31 Me. 152. If, by reason of willfulness, ignorance, or want of proper care, an officer levies on property having an extra value on account of some peculiarly valuable quality, and for that reason makes an excessive levy, he is liable. "Certainly, a constable with an execution for ten or twenty dollars, would not be justified in levying on a colt worth hundreds of dollars because of its blood, when an ordinary scrub colt would suffice to pay the debt, merely because he did not know the difference, when he used no means to inform himself": *Vance v. Vanarsdale*, 1 Bush (Ky.), 504.

In an action against a sheriff for the recovery of personal property improperly attached, or its value, where there is no allegation in the complaint that the levy was excessive, the plaintiff cannot make use of the fact of an excessive levy as shown by the evidence in order to recover for such excess: *Sexey v. Adkison*, 40 Cal. 408. Where at a sheriff's sale a whole tract is unnecessarily sold for more than the amount of the execution, a purchaser who voluntarily pays the plaintiff the purchase price can recover of the sheriff only nominal damages: *Pepper v. Commonwealth*, 6 T. B. Mon. (Ky.) 27. In *Drake v. Murphy*, 42 Ind. 82, it was held that the mere levying upon property and advertising it, if excessive, did no harm, so long as at the sale the sheriff sold no more than was necessary to satisfy execution.

**g. Insufficient Levy.**—As was before pointed out, if the officer fails to levy on sufficient property, he is liable to the plaintiff in the

execution; if he levies on too much, to the defendant: *Commonwealth v. Lightfoot*, 7 B. Mon. (Ky.) 298. He must take sufficient property, such as a reasonably prudent man would do: *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238; and should allow for a depreciation in price at a public sale: *French v. Snyder*, 30 Ill. 339, 83 Am. Dec. 193. See to the same effect *Governor v. Powell*, 9 Ala. 83; *Griffin v. Ganaway*, 8 Ala. 625. Where the goods levied on are sufficient at the time to satisfy execution, but depreciate in value before the sale, the sheriff is not liable therefor: *Governor v. Carter*, 3 Hawks (N. C.), 328, 14 Am. Dec. 588. If the sheriff does not exercise due diligence, he is liable: *McKinney v. Craig*, 4 Sneed (Tenn.), 577; and it is not ordinary diligence for the sheriff to take the representations of the defendant in the writ as to the value of the goods seized thereunder; and if there are sufficient goods on hand, but, relying on such representations, he fails to seize sufficient, he is liable: *Adams v. Spangler*, 17 Fed. 133. So where, to satisfy a writ for three hundred and fifty dollars, he levies on goods which he says are of the value of seven hundred, but when sold bring only ninety dollars, in the absence of a showing of depreciation, this is such carelessness as to make him liable for an insufficient levy: *Alexander v. State*, 42 Ark. 41.

In an action for making an insufficient levy, the burden is on the judgment creditor to plead and prove that during the life of the writ, the debtor was possessed of property liable to seizure, and that the sheriff negligently failed to seize it: *Conway v. Magill*, 53 Neb. 570, 73 N. W. 702. For failure to make a sufficient levy the measure of damages is the actual injury done the plaintiff, and not necessarily the amount of the debt: *Commonwealth v. Lightfoot*, 7 B. Mon. (Ky.) 298.

If the sheriff does not levy on sufficient property at first to satisfy an execution, it is his duty to do so in a reasonable time thereafter: *Indiana Cent. R. Co. v. Bradley*, 15 Ind. 23; and for making a second levy he is not liable as a trespasser: *Pugh v. Calloway*, 10 Ohio St. 488. In *Denvrey v. Fox*, 22 Barb. 522, the court, speaking of such second levy, said: "The direction in the execution is to levy, of the goods and chattels of the defendant, the amount of the judgment. There is no restriction upon the officer as to the amount of property he shall take, nor is he required to levy upon the property at the same time. It would be extremely dangerous to hold that when the officer had once levied upon sufficient property to satisfy the execution, his power to levy upon more was gone. How is he to know when he has made a sufficient levy? This cannot usually be ascertained with certainty until the sale."

**h. Failure to Return and False Return.**—Failure to return an execution within the time fixed by law is such a breach of legal duty as to entitle the plaintiff to recover at least nominal damages: *People v. Johnson*, 4 Ill. App. 346; and where the failure to return the writ is made punishable by a statutory penalty, no damage due

to such failure need be shown: *Morehead v. Holliday*, 1 *Smedes & M.* (Miss.) 625; *Cox v. Ross*, 56 *Miss.* 481; and he should be made to pay the prescribed penalty, even though the process be worthless: *Underwood v. Russell*, 4 *Tex.* 175. The return is defined in *Beall v. Shattuck*, 53 *Miss.* 358, to be "the indorsement of the action of the officer on it, and its delivery to the proper custodian of the office out of which it is issued." Making a false return is also actionable negligence: *Astor v. Keller*, 61 *N. J. L.* 78, 38 *Atl.* 819.

In *Cox v. Ross*, 56 *Miss.* 481, the court said: "It is well settled that, in actions against an officer for a false return, the plaintiff cannot recover without alleging and proving a valid judgment, and the rule seems to be the same in the common-law actions for a failure to return." For such failure a rule against the sheriff or an action on the case will lie at the plaintiff's option: *Burk v. Campbell*, 15 *Johns. (N. Y.)* 456; and the assignee of a judgment is the proper party to recover against an officer for neglect to make the return under a statute allowing his liability on motion: *Ranken v. Jones* (*Tex. Civ. App.*), 53 *S. W.* 583.

In the United States, when sued for failure to make a return, it devolves upon the sheriff to show the insolvency of the debtor, if he wishes to make that defense, while in England the creditor must prove his solvency: *Dailey v. State*, 56 *Miss.* 475. It is a good defense that the judgment debtor had no property subject to execution: *In re Smelker*, 10 *S. Dak.* 188; and the burden is on the officer to show the property is exempt: *Second Nat. Bank v. Gilbert*, 174 *Ill.* 485, 66 *Am. St. Rep.* 306, 5 *N. E.* 584; as it also is to show that the property was not sufficient to satisfy the judgment, and in the absence of such a showing it will be presumed sufficient: *Ranken v. Jones* (*Tex. Civ. App.*), 53 *S. W.* 583. Where the plaintiff has adopted or ratified an insufficient return he will be held to have waived his right: *Young v. Donaldson*, 2 *Heisk. (Tenn.)* 52; and it is a defense that the officer, when sued for making a false return, paid over all the property to other persons than the plaintiff, in conformity with other process and orders of court, made prior to the plaintiff's, whether such process and orders were properly made or not: *American Hosiery Co. v. Riley*, 12 *Abb. New Cas. (N. Y.)* 329. It is no defense, for failure to return an execution, that the enforcement of the debt has been enjoined: *Kennedy v. Coleman*, 2 *Litt. (Ky.)* 6.

In an action by special bail against a sheriff for making a false return that the defendant could not be found in his county, it is not negligence as a matter of law that he failed to inquire of the plaintiff in execution as to the defendant's whereabouts: *Koch v. Coats*, 43 *Mich.* 30, 4 *N. W.* 534.

#### **i. Liability in Attachment Proceedings.**

**1. Generally Same as on Execution.**—In general, the same liabilities attach to a sheriff in serving mesne process that do in serving



final process. He is required, in the same manner, to use diligence and good faith in making the levy; and if he knows of property belonging to the debtor, but not in his possession, it is his duty to attach it under a general order of the creditors: *Weld v. Chadbourne*, 37 Me. 221; and he is answerable for an insufficient levy of attachment, the same as on final process: *Ransom v. Halcott*, 18 Barb. 56; as he also is for the wrongful release of an attachment, in which case no demand for the goods is necessary: *Cooper v. Mowry*, 16 Mass. 5. An attachment of property cannot be made by an officer before process directing it is placed in his hands: *Wales v. Clark*, 43 Conn. 183; but where process is issued and it is sufficiently indicated to the officer that the plaintiff desires an attachment, he is liable for omitting to levy it when in his power to do so, and a direction, "Mr. Officer—attach suff.," is enough: *Kimball v. Davis*, 19 Me. 310; *Abbott v. Jacobs*, 49 Me. 319.

Where, by the negligence of the officer in attaching real property, others get priority in attachments on the right to redeem it, the officer is liable, although the other creditors never levied their executions on such right: *Kittredge v. Bellows*, 7 N. H. 399. So, where a sheriff received an attachment at 1 o'clock in the morning, with directions to levy upon real estate known to him, and he remained in the county seat of the county where such land was situated long enough to have levied upon it, and he then went to a town over twenty miles distant, where he levied on the real property in the afternoon, prior to which time and after leaving the county seat, the debtor mortgaged the land so that the plaintiff could collect nothing on his judgment, the sheriff was held liable for neglect: *Springett v. Colerick*, 67 Mich. 362, 34 N. W. 683. Where the officer is given two executions, one secured and the other unsecured, against the same defendant, and instructed to set off the unsecured execution against an execution sued out by the defendant, if the latter so offered, but he sets off the other execution, which is secured by attachment, he is liable for defeating such attachment: *Coggeshall v. Varnum*, 19 Pick. (Mass.) 422.

2. **Defenses.**—For failure to levy an attachment it is no defense that the officer had levied on the same goods under a prior attachment, which had been discharged: *Smith v. Heineman*, 118 Ala. 195, 72 Am. St. Rep. 150, 24 South. 364; nor that the sheriff holds the property under a chattel mortgage: *Chittenden v. Crosby*, 5 Kan. App. 534, 48 Pac. 209; nor can he avoid liability on the ground that he did not receive indemnity, nor payment of his fees, when he did not demand them when instructed to attach: *Perkins v. Pitman*, 34 N. H. 261. See, also, *Alexander v. State*, 42 Ark. 41. In *Start v. Sherwin*, 1 Pick. (Mass.) 521, where the debtor's interest in land was attached, it was held that the officer having no instructions from the creditor to levy on the equity of redemption, was not liable for failing to do so, unless he knew that he had attached an equity of redemption only; he is not bound to search the records and ascertain

if the land is mortgaged: See *Bacon v. Leonard*, 4 Pick. (Mass.) 277, in accord.

#### **j. Care of Property in Officer's Charge.**

**1. Diligence Required.**—For negligently keeping goods in his custody in an unsafe place or exposing them to destruction, a sheriff is liable: *Jenner v. Joliffe*, 9 Johns. (N. Y.) 381. Where, however, the officer is diligent, no blame attaches to him. It is in determining upon the degree of diligence necessary to exonerate him that difficulty arises. In *Creswell v. Burt*, 61 Iowa, 590, 16 N. W. 730, the different authorities are collated: "In *Freeman on Executions*, section 270, it is said: 'Whenever property in the hands of a sheriff or constable is purloined, or otherwise escapes from custody, the resulting loss must be borne by some one. It is, at least, as just that this loss should fall upon the officer, whose duty it was to protect the property, as that it should fall upon the plaintiff or defendant, neither of whom has the authority to afford such protection. Property seized under execution is ordinarily to remain in custody of the law but a short time. Property taken in attachment, on the other hand, must frequently be kept for a long period of time, to await the result of protracted litigation. There is, therefore, much reason for sanctioning, in attachment cases, a less degree of diligence than ought to be exacted when property is held under execution. But the tendency of a majority of the modern decisions is to place levies under attachment upon the same footing with levies under execution, and to exact of officers in either case only that degree of care in keeping property which an owner of ordinary prudence and sagacity would exercise in preserving like property.' . . . . The following cases recognize the doctrine that a sheriff in the keeping of property levied upon under an execution must exercise more than ordinary care: *Collins v. Terrall*, 2 Smedes & M. (Miss.) 383; *Richardson v. Spence*, 6 Ohio, 13; *Hartleib v. McLean*, 44 Pa. St. 510, 84 Am. Dec. 464; *Wheeler v. Hambright*, 9 Serg. & R. (Pa.) 390; *Gilmore v. Moore*, 30 Ga. 628. The following cases hold that an officer is required to use ordinary diligence in the preservation of property taken under execution: *Stewart v. Nunemaker*, 2 Ind. 47; *State v. Nelson*, 1 Ind. 522; *Browning v. Hanford*, 5 Hill (N. Y.), 588, 40 Am. Dec. 369. The following cases and authorities hold that a sheriff is required to use only ordinary care in the preservation of attached property: *Briggs v. Taylor*, 28 Vt. 180; *Dorman v. Kane*, 5 Allen (Mass.), 38; *Parrott v. Dearborn*, 104 Mass. 104; *Snell v. State*, 2 Swan (Tenn.), 344; *Bridges v. Perry*, 14 Vt. 262; *Runlett v. Bell*, 5 N. H. 433; *Mills v. Gilbreth*, 47 Me. 320, 74 Am. Dec. 487; *Shearman and Redfield on Negligence*, sec. 530. It seems to us that there is no reasonable ground for establishing a different rule of diligence in cases of attachment and execution, and that the better rule is that which requires a sheriff or constable to exercise only ordinary care in the preservation of such property.'" It is sometimes stated that his liability for the share of goods is the same as that of a bailee for

hire: *Tudor v. Lewis*, 3 Met. (Ky.) 378; *Moore v. Westervelt*, 27 N. Y. 234. For additional authorities on the subject of ordinary care, see *McRay v. Scott*, 39 La. Ann. 1116, 2 South. 584; *Lambeth v. Joffrion*, 41 La. Ann. 749, 6 South. 558; *Kendall v. Morse*, 43 N. H. 553.

An officer is not liable for deterioration in the goods while in his custody without his fault: *Robinson v. Barrows*, 48 Me. 186; but where he keeps a carriage and wagons levied on in an open field during winter, he is, and the difficulty of finding a place under cover cannot avail him: *Briggs v. Taylor*, 28 Vt. 180.

2. **Receiptors.**—It is a common occurrence for the officer to deliver the possession of the goods levied upon to a third person, who is commonly known as a receiptor. In such a case, it is for the convenience of the officer only, and the receiptor is but a servant of his, and the creditor is not a party to the proceeding at all; he is, therefore, liable to the creditor for the safekeeping of the property: *Eastman v. Avery*, 23 Me. 248; *Torrey v. Otis*, 67 Me. 573; *Blake v. Kimball*, 106 Mass. 115. Where, however, the officer delivers the goods to a bailee for safekeeping nominated by the plaintiff, the former is not responsible for his fidelity: *Donham v. Wild*, 19 Pick. (Mass.) 520, 31 Am. Dec. 161.

As to whether the insolvency of the receiptor can avail the sheriff as a defense, there is a conflict of authority. In *Gilbert v. Crandall*, 34 Vt. 188, he was not allowed to make that plea; but in *Runlett v. Bell*, 5 N. H. 433, *Howard v. Whittemore*, 9 N. H. 133, he was, so long as the receiptor was solvent when he received the goods.

Where the officer had attached personal property and delivered them to a receiptor, who permitted the owner to retain them, it was held that he might lawfully take them from such owner, who merely held at the pleasure of the officer or his agent: *Bond v. Padelford*, 13 Mass. 393.

3. **Excuses for Loss.**—It is the duty of the officer who seizes property under attachment to retain control of it, so that he may return it if required: *Farris v. State*, 33 Ark. 70; and if he parts with the goods attached, he does so at his peril: *Phillips v. Bridge*, 11 Mass. 242. If he levies and permits the defendant to remove the property, or leaves it in his possession, if a loss occur, the officer is liable: *Commonwealth v. Hurt*, 4 Bush (Ky.), 64; *Byrne v. Anderson*, 8 La. Ann. 139; and the fact that he takes a bond from the defendant for the delivery of such goods does not release him from liability, as the bond is merely for his own security: *Wadsworth v. Parsons*, 6 Ohio, 449.

It is no defense that the goods were taken from him by force: *Wood v. Bodine*, 32 Hun, 354. There the court said: "After the sheriff was deprived of his possession, he remained passive, and did no act whatever, with a view of regaining the custody of the property. Therein he was guilty of a breach of duty, which constituted actionable negligence. As the goods were not destroyed and re-

remained within his jurisdiction he had ample power and authority to regain the possession. Although he had been deprived of the actual possession, the goods remained in the custody of the law, and the levy under the attachment continued. It has never been held, by any court, as far as I can find, that a rescue of the property by a claimant, unless the claim was well founded, was a good and a sufficient return to a process in the hands of a sheriff. The sheriff had the power to raise the posse comitatus and re seize the property. He could have done it on the spot and gone in hot pursuit or acted with more deliberation and organized a force on a later day."

Where the plaintiff, by his own act, brings about the loss, as where he allows the defendant to keep and use the property, the sheriff, of course is not liable: *Pepin v. Dunham*, 20 La. Ann. 88; but it is no answer that cattle, which had been attached and not retained, would have been too expensive to maintain: *Sewall v. Mattoon*, 9 Mass. 535. If the owner of the goods levied upon pays plaintiff the debt, and the property is lost, no demand on the sheriff for restoration is necessary; and it makes no difference whether the loss occurred before or after payment of the debt: *Conover v. Gatewood*, 2 A. K. Marsh. (Ky.) 566, 12 Am. Dec. 451. Where the officer seizes goods under a writ against a party, and so endorses on the writ, and permits them to be removed from his custody, when sued for such removal, he is not estopped to plead that the title to the goods was in a third person, and not in the defendant: *State v. Ogle*, 2 Houst. (Del.) 371.

When sued for not keeping the property attached so that it could be levied on in execution, if the execution be paid during the pendency of that suit, the plaintiff may still recover nominal damages and costs, such payment going only in mitigation of damages: *Brown v. Richmoud*, 27 Vt. 583; and the officer is not entitled to have a reduction made from the full value of the property, in mitigation of damages, for the expenses which might have been incurred if it had been safely kept: *Lovejoy v. Hutchins*, 23 Me. 272.

**k. Receiving Other Than Money in Payment.**—In payment of execution, a sheriff can receive only legal currency: *Planters' Bank v. Scott*, 5 How. (Miss.) 246; and if he takes anything but cash or bank notes circulating as such without the creditor's consent, he is acting out of the line of duty, and is liable: *Draper v. State*, 1 Head (Tenn.), 262. In *Griffin v. Thompson*, 2 How. (U. S.) 244, it is held that he has no right, unless authorized by the plaintiff, to receive bank notes in payment; and if they subsequently become worthless, he is liable: *Harper v. Fox*, 7 Watts & S. (Pa.) 142.

Where he has levied under a number of writs of fieri facias, and is selling thereunder, he cannot take anything but cash at the sale, even though he made arrangements with some of the plaintiffs to receive something other than cash, if all of them do not agree thereto: *Phillips v. Behn*, 19 Ga. 298. In *Lindsey v. Cock*, 40 Ga. 7, the officer received payment in state bank bills, for property sold by him, and was enjoined from paying it over to the plaintiff; in the meantime



he loaned it out and took a note therefor, which was paid in Confederate money. He was held liable for the value of the bank bills at the time he was required to pay the same over to the plaintiff. But where, during the war, a sheriff collected money under a fieri facias and received Confederate money, the only kind then in circulation, which he kept on hand, ready to pay to plaintiff, it was held a good defense to a rule against him: *Hutchins v. Hullman*, 34 Ga. 346. If he takes a note in satisfaction of execution, indorses it on the execution, and returns it satisfied, the return is not conclusive, and not prima facie evidence of satisfaction, without some authority for receiving the note being shown: *Mitchell v. Hackett*, 14 Cal. 661. But where he returns that he has made the money and satisfied the execution, though in fact not paid in money, such return holds him liable to the party entitled to it, and estops him from denying that he received money: *Tiffany v. Johnson*, 27 Miss. 227. Whatever the sheriff receives in lieu of money must be treated as money, and accounted for as such: *Robinson v. Brennan*, 90 N. Y. 208.

### 1. Failure to Pay Over Money.

1. **At Common Law.**—There is no doubt that the sheriff, who has collected money on execution, is liable for a failure to pay the same to the party entitled thereto, and the authorities are unanimous on that point. But there is a conflict as to whether a demand is a necessary condition precedent to a suit for a recovery thereof. It is held not essential in *Hill v. Fitzpatrick*, 6 Ala. 314, overruling *McBroom v. Governor*, 6 Port. (Ala.) 32; *Canterberry v. Commonwealth*, 1 Dana (Ky.), 415; *Brewster v. Van Ness*, 18 Johns. (N. Y.) 133. See, also, *Teal v. Lyons*, 30 La. Ann. 1140. In *Church v. Clark*, 1 Root (Conn.), 303, *Weston v. Ames*, 10 Met. (Mass.) 244, *Moody v. Mahurin*, 4 N. H. 296, it was held necessary; and in such case the statute of limitations does not commence to run till such demand: *Weston v. Ames*, 10 Met. (Mass.) 244.

Where a statute requires the money to be paid "without delay," it is held in *Nutzenholster v. State*, 37 Ind. 457, that no demand to pay the money over to a justice of the peace within a month after it is collected is necessary. But where a penalty of ten per cent for refusal to pay it over is given, it will not attach until after a demand and refusal: *Pope v. Hays*, 1 Mo. 450.

A third view is adopted by the South Carolina courts. They hold a demand necessary, except where the sheriff asserts some right in opposition to the plaintiff's claim, or has misapplied the money: *Sims v. Anderson*, 1 Hill, 394; *Taylor v. Easterling*, 1 Rich. 310.

The sheriff is not bound to pay over the money made on execution before the return of the writ: *Stone v. Ruffin*, 2 Ohio, 503; and out of the amount collected he may retain his legal fees and charges: *Sil-liven v. Bellocq*, 20 La. Ann. 305. Where he takes a promissory note in payment of property of the debtor which he has sold, and receives interest thereon, he is liable to the debtor for the sale, including interest, after deducting the amount due upon the execution: *Farley v.*

Monroe, 21 N. H. 146. Where a deputy sells goods on credit, which he refuses to pay over when paid, and which was received during the pendency of the suit, the sheriff is liable: *Seaver v. Pierce*, 42 Vt. 325.

In *Harwell v. Worsham*, 2 Humph. (Tenn.) 524, 37 Am. Dec. 572, a constable received an execution against a defendant, who was also indebted to the constable, who, however, had no execution of his own against him; the debtor delivered a share to the officer for sale, but without any directions as to the application of the proceeds thereof. The court held that he was bound to appropriate the money thus raised to the satisfaction of the execution in his hands, and not to his own private debt.

**2. Statutory Penalties.**—The failure of an officer to pay over the money has been the subject of a great many statutes, giving an additional penalty therefor. It is held, under these statutes, that they apply only where the officer acts willfully, and not where he is in honest doubt due to conflicting claims, and uses erroneous judgment: *Johnson v. Gorham*, 6 Cal. 195, 65 Am. Dec. 501; *Conway v. Campbell*, 11 Mo. 71; *Giffin v. Smith*, 2 Nev. 374; *Nash v. Muldoon*, 16 Nev. 404. In order to charge a sheriff with the statutory thirty per cent for not paying over the money upon demand, it is necessary that it be made by a person having authority to receive the money and execute a valid discharge: *Bulfinch v. Balch*, 8 Me. 133. Where the sheriff has no excuse to offer for not paying over the money, the court has no right to relieve him from the payment of the statutory damages: *Coykendall v. Way*, 29 Minn. 162, 12 N. W. 452, 453.

**3. What Actions Will Lie.**—An action of assumpsit, as for money had and received, will lie against an officer for the amount not turned over: *Armstrong v. Garrow*, 6 Cow. (N. Y.) 465; *Dyert v. Crane*, 1 Wend. 534; but he may be also ruled; but after rule the plaintiff is not bound to proceed by attachment, but may sue in assumpsit: *Slingerland v. Swart*, 13 Johns. 255. As before remarked, if the officer has a well-grounded doubt as to his duty with regard to the fund, he is entitled to a civil action: *In re Randall* (Minn.), 76 N. W. 1020; but selling and delivering property without receiving the price is a wrong for which the party entitled to any surplus remaining after execution is satisfied, may proceed against the sheriff in a summary manner, under a statute compelling correction of the injury done: *Kumler v. Brandenburg*, 39 Minn. 59, 38 N. W. 704. Where there is an excess of execution in the sheriff's hands, he becomes the debtor of the defendant in that amount, as for so much money had and received, and it is not considered as in the custody of the law, and may be attached: *Dickison v. Palmer*, 2 Rich. Eq. (S. C.) 407.

The assignee of a judgment may sue an attaching officer in the name of his assignor as well as in his own name, for failure to account for the proceeds of property sold on mesne process: *Jackson v.*

Smith, 52 N. H. 9; or may sue in his own name without styling himself assignee: *Alexander v. Hancock*, 2 Rich. (S. C.) 100.

4. **Defenses.**—Where a sheriff is enjoined from proceeding under a writ before the expiration of the time to have made the money, it is a good defense: *Cason v. Mulling*, 50 Ga. 598; but where he sells property, he cannot show that he received no purchase money: *Ferguson v. Tutt*, 8 Kan. 370; *Appleton v. Bancroft*, 10 Met. (Mass.) 231; nor can he allege that the property is not the defendants when he has levied upon it as such, and is called upon to account for the proceeds: *Frankel v. Elias*, 60 How. Pr. (N. Y.) 74.

Payment of the money collected to the plaintiff's attorney of record will discharge him, unless expressly notified by plaintiff not to pay him: *Butler v. Jones*, 7 How. (Miss.) 587, 40 Am. Dec. 82; but where the attorney's power was revoked before the delivery of execution to him, a payment to such attorney is no defense: *Parker v. Downing*, 13 Mass. 465. So, where an officer receives execution, with notice that the claim on which judgment was recovered had been assigned to a third person, who prosecuted it at his expense, and collected the execution and paid it to the nominal plaintiff, he must answer to the assignee for the amount of costs in the action on the claim: *Riley v. Taber*, 9 Gray (Mass.), 372.

A sheriff selling on execution may take on himself to decide which of several executions in his hands is entitled to priority in payment but he does so at his peril: *Isler v. Colgrove*, 75 N. C. 334. Where an officer applies money realized on execution to the payment of a junior judgment creditor, although directed to do so by order of court under process by rule, he is nevertheless liable to a senior judgment creditor, where the latter was not a party to the rule; it is a violation of the rule of law that no one shall be bound by a judgment or order who is not a party thereto, or in privity with a party; the officer could have protected himself by causing the senior creditor to be made a party, and failing to do so, cannot throw the consequences upon him: *State v. Boles*, 13 S. C. 283.

A sheriff deposits money collected in a bank at his own risk, and if it fails he is liable: *Phillips v. Lamar*, 27 Ga. 228, 73 Am. Dec. 731. So if he collects money and puts it in a trunk under his bed, and it is stolen, he is liable: *Gilmore v. Moore*, 30 Ga. 628.

m. **Disobeying Plaintiff's Instructions.**—An execution creditor is not bound to point out property to be levied on: *Albany City Bank v. Dorr*, Walk. (Mich.) 317; but if specific directions or instructions are given the officer in regard to levying he is bound to obey them if he lawfully can, and mere acting in good faith is no defense: *Smith v. Judkins*, 60 N. H. 127; *Root v. Wagner*, 30 N. Y. 9, 86 Am. Dec. 348. So if he is directed to serve the writ immediately, and he has a reasonable belief that a loss will ensue if he delays, he is bound to follow the direction; if, however, there is no direction or belief as to loss, he may serve it within the period prescribed by law: *Tucker v. Bradley*, 15 Conn. 46. It is competent for the plaintiff who has a

judgment against several defendants, to direct the sheriff to levy on the property of all or either of them: *Godfrey v. Gibbons*, 22 Wend. 569; but he need not levy on firm property to satisfy an individual indebtedness, as such is not his duty: *Swan v. Gilbert*, 67 Ill. App. 236.

The duty of the sheriff in obeying instructions is well set forth in *Ranlett v. Blodgett*, 17 N. H. 298, 43 Am. Dec. 603, in the following words: "When a sheriff takes a writ, with directions to serve it in a particular manner, without requiring a written indemnity, he is bound to serve it, if he may, according to the instructions; and it is not a sufficient excuse for him that he subsequently obtained some information which led him to suppose that a service in the manner directed would be ineffectual for the interests of the plaintiff, and even expose himself to an action, if his supposition was erroneous, and a service in the manner directed would, in fact, have been legal and effectual. He is liable unless he can show that he could not lawfully have obeyed the directions. He may require an indemnity, with a surety, if that is important for his security. If he makes no such request, but undertakes to serve the process, it is not sufficient for him to say that he had some information which led him to believe that it would be unsafe so to serve it. To admit such an excuse would be dangerous, and the authorities are the other way: *Ball v. Badger*, 6 N. H. 405; *Marshall v. Hosrner*, 4 Mass. 63; *Bond v. Ward*, 7 Mass. 123, 5 Am. Dec. 28."

Where indemnity is offered an officer upon request made to him by a second attaching creditor not to apply the proceeds of a sale on execution to satisfy the judgment of a first attaching creditor, the grounds of such request need not be communicated to the officer to render him liable for disregarding it: *Peirce v. Partridge*, 3 Met. 44.

An officer need not levy on other property than that taken on the request of the debtor: *Moulton v. Chadborne*, 31 Me. 152; but he may become liable to the defendant, for disobeying the instructions of the plaintiff, as where the latter requests him to suspend a sale; and in such a case it is no defense that the sale was made by direction of the plaintiff's attorney, as it does not appear but that he may have violated the plaintiff's orders: *Morgan v. People*, 59 Ill. 58.

**n. Liability in Taking Bonds.**—The question of a sheriff's liability for not taking a bond, or taking an insufficient one, is of great importance, especially in replevin cases. Absolute failure to take a bond, when required by law, renders the officer liable: *Fitzhugh v. Hackley*, 70 Ark. 54, 66 S. W. 146; but his responsibility for accepting a defective bond is a more difficult matter to fix. As to the sufficiency required, there are three views: 1. That the surety must be apparently responsible, the officer acting in good faith, and making diligent and reasonable inquiry; 2. That the apparent responsibility of the surety is not sufficient, but that he must be really so, and if apparently solvent but in fact insolvent, the offi-



cer is liable; 3. That the surety must not only be good at the time of taking, but must continue so up to judgment: *Bank of Middlebury v. Rutland*, 33 Vt. 414.

The first view is supported by *Larney v. People*, 82 Ill. App. 564; *People v. Robinson*, 89 Ill. 159; *Shull v. Barton*, 56 Neb. 716, 71 Am. St. Rep. 698, 77 N. W. 132. These all hold the sheriff to the exercise of such diligence and sound judgment as a prudent man would use in important business affairs, and if he so acts he is not liable, not being an insurer of the surety's solvency. Good faith alone, however, is no protection, when by the use of diligence the taking of insolvent sureties might have been avoided: *Noble v. Desmond*, 72 Cal. 330, 14 Pac. 16; *Robinson v. People*, 8 Ill. App. 279; *Shull v. Burton*, 56 Neb. 716, 71 Am. St. Rep. 698, 77 N. W. 132.

*Commonwealth v. Thompson*, 3 Dana (Ky.), 301, follows the second view, holding that a sheriff takes security on a replevin bond at his peril and if insufficient when executed he is liable; but if good at that time, and it subsequently fails, he is not.

The third view represents the Pennsylvania rule, and there the sureties must continue solvent up to the time of judgment, or the sheriff is responsible. It is admitted by the court to be a hard rule, but followed on the ground of stare decisis: *Pearce v. Humphreys*, 14 Serg. & R. (Pa.) 23.

A replevin bond is for the benefit of the defendant as well as the protection of the officer, and if he fails to return it into court with the writ, so as to afford the defendant a chance to require additional security, he is liable for damages: *People v. Robinson*, 89 Ill. 159; likewise if he takes a bond not according to law, which is insufficient to protect the defendant: *Mayer v. People*, 190 Ill. 109, 60 N. E. 96; and he is liable to the person to whose benefit the bond, if good, would accrue: *Newbert v. Cunningham*, 50 Me. 231, 70 Am. Dec. 612.

Where an officer takes property from a party by virtue of a writ of replevin in which the bond is defective, he is liable: *Dearborn v. Kelley*, 3 Allen (Mass.), 426. Where he accepts a bond with one surety only, he does so at his peril: *Kesler v. Haynes*, 6 Wend. 547; and if the names of the sureties are forged, he is liable, as the genuineness of the signatures is at his risk: *Marsh v. Bancroft*, 1 Met. (Mass.) 497; so where he takes a bond without conforming to the statute, and the sureties prove insufficient he is liable: *Miner v. Coburn*, 4 Allen (Mass.), 136.

The question as to whether the subsequent retaking of the goods is a defense is discussed in *Shull v. Barton*, 58 Neb. 741, 79 N. W. 732, the court saying: "The retaking of the identical property by the sheriff under the executions might or might not be a competent defense in favor of the coroner for the approval of an insufficient bond. If the chattels were in the same condition and of the same value as at the time the same were seized under the replevin writ, the defense would be complete; otherwise it would not be: *Rinker v.*

Lee, 29 Neb. 783, 46 N. W. 211; *Otto v. Burch*, 50 Neb. 894, 70 N. W. 513. The taking of the property by the sheriff would constitute a defense *pro tanto*."

In an action against an officer for taking insufficient sureties in replevin, the statute of limitations commences to run from the time when the plaintiff in replevin, after judgment for a return, has failed to return the property replevied upon demand: *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612.

The damages which ensue must, of course, arise from the defendant's breach of duty: *Robinson v. People*, 8 Ill. App. 279; and when insufficient sureties are taken, the plaintiff may recover a sum reasonably expended in endeavoring to avail himself of the bond taken: *Choate v. Stark*, 18 N. H. 131.

The fact that an imperfect replevin bond was found among the papers, even if placed there by the sheriff himself, does not render a good bond, which was taken, void, nor make the sheriff liable for failure to take a good and sufficient bond: *Rodrick v. People*, 81 Ill. App. 121.

#### o. Escapes.

1. **Voluntary and Negligent.**—At common law there are two kinds of escape, voluntary and negligent, for either of which an action on the case lies, whether occurring before or after judgment: *Adams v. Turrentine*, 30 N. C. (8 Ired.) 147. The difference between the two lies in the fact that if the escape is voluntary, the return of the debtor to custody before suit is instituted against the sheriff is no defense, whereas in the case of a negligent escape it is: *Ballou v. Kip*, 7 Johns. (N. Y.) 175; *Cortis v. Dailey*, 47 N. Y. Supp. 454, 21 App. Div. 1; *Lash v. Ziglar*, 5 Ired. (N. C.) 702; and permitting a debtor to go at large from day to day, upon presenting himself at the sheriff's office, every morning, is a voluntary escape: *Hopkinson v. Leeds*, 78 Pa. St. 396; so a return by an officer that the county had provided no jail and he therefore permitted the debtor to go at large shows an escape: *Stone v. Wilson*, 10 Gratt. (Va.) 529. The burden is on the plaintiff to show that he had a valuable debt against the defendant which he lost by the act of the officer, and showing that he holds a promissory note barred by the statute of limitations at the time of the escape is not sufficient: *Slocum v. Riley*, 145 Mass. 370, 14 N. E. 174.

2. **Defenses.**—The insufficiency or unsafeness of the jail is no defense for an escape: *Slemaker v. Marriott*, 5 Gill & J. (Md.) 406; *Richardson v. Spencer*, 6 Ohio, 13; *Kepler v. Barker*, 13 Ohio St. 177; nor is it an answer to a negligent escape that he used care in keeping the prisoner: *State v. Mullen*, 50 Ind. 598. Where there is a voluntary escape, if the creditor afterward receives the amount of the debt, the sheriff's liability is extinguished: *Currie v. Worthy*, 3 Jones (N. C.), 315; but the insolvency of the debtor is no defense, going only in mitigation of damages, and should not be pleaded:

Barnes v. Willett, 35 Barb. 514. Where the escape is due to a fraudulent device between the debtor and creditor for the purpose of holding the officer liable, there can be no recovery against him: Dexter v. Adams, 2 Denio (N. Y.), 646; Van Wormer v. Van Voast, 10 Wend. 356.

In an action for an escape the sheriff cannot avail himself of any irregularity in the process under which the arrest was made; but he can if void: Howard v. Crawford, 15 Ga. 423; and in such a case the court should instruct the jury that it is void, or exclude it from them altogether: Gorton v. Frizzell, 20 Ill. 291. If the process is insufficient to authorize an arrest, as where there is an affidavit for the arrest of "the defendant" in a writ against two defendants, without showing which of them is meant, the officer is not liable for an escape: Hitchcock v. Baker, 2 Allen (Mass.), 431. Nor is he liable where the debtor is released by a judgment on habeas corpus proceedings, in obeying the order for his discharge, whether the process is regular, or the judge erred in the exercise of his judgment: Hathaway v. Holmes, 1 Vt. 405; and if the order of discharge does not show jurisdiction in the county judge, in failing to recite certain matters, if the proof given upon the trial shows them as true, it is a good defense: Schaffer v. Riseley, 44 Hun, 6.

### 3. Measure of Damages.

**A. The American Rule.**—In an action for an escape, the presumption is that the debtor lost the entire debt by the escape, and it is therefore the measure of damages; and the plaintiff need not show that the debtor was solvent: Faulkner v. Bartley, 6 Ark. 150; Renick v. Orser, 4 Bosw. (N. Y.) 384. The American doctrine of damages is summed up by the court in Hootman v. Shriner, 15 Ohio St. 43, as follows: "1. On proving the judgment, arrest and escape, the plaintiff is, *prima facie*, entitled to recover the whole amount of his debt; 2. To reduce the recovery below the amount of the debt due from the escaping prisoner the onus probandi rests upon the defendant; 3. For this purpose the defendant may not show that the amount of the debt is still capable of being collected from the escaped prisoner; but may show his partial or total insolvency or pecuniary worthlessness at the time of the escape; 4. That on proving judgment, arrest and escape, the plaintiff, in all cases, is entitled to recover at least nominal damages; 5. Where the jury find the escape to have been not only voluntary on the part of the officer, but that, in permitting the same, he was actuated by fraud, malice, or corruption they are not restricted to the amount of pecuniary injury actually sustained, and may include reasonable exemplary damages; but, with this exception, where evidence in mitigation is given, the actual injury sustained is the proper measure of recovery."

It is generally held that the poverty or insolvency of the debtor may be given in evidence to show that the plaintiff could have re-

covered little or nothing of his debt; and nominal damages will then be allowed: *Crawford v. Andrews*, 6 Ga. 244; *State v. Mullen*, 50 Ind. 598; *Hotchkiss v. Whitten*, 71 Me. 577; *State v. Baden*, 11 Md. 317; *Weld v. Bartlett*, 10 Mass. 470; *Slocum v. Riley*, 145 Mass. 370, 14 N. E. 174. But see *Wolverton v. Commonwealth*, 7 Serg. & R. (Pa.) 273. While *prima facie* the damage is the amount of the debt, the plaintiff is entitled to such damage as he actually sustained, and not necessarily the amount of the debt: *Crawford v. Andrews*, 6 Ga. 244; *Chase v. Keyes*, 2 Gray (Mass.), 214.

A distinction however must be made where by statute the sheriff is made liable as bail for the escape of the debtor, where he fails to take bail. In such a case he is liable to the same extent as the bail and the insolvency of the debtor cannot be shown in mitigation of damages: *Metcalf v. Stryker*, 31 Barb. 62; *Bensel v. Lynch*, 44 N. Y. 162. But where one is arrested on mesne process and escapes, and the sheriff by his return negatives any idea of becoming special bail, he is liable only for the actual damage, and not the amount of the debt: *State v. Falls*, 63 N. C. 188.

**B. The English Rule.**—In England, the insolvency of the debtor may give more than mere nominal damages. The true measure of damages is the value of the custody of the debtor at the time of his escape, and in estimating that value the jury may take into account not only the debtor's own resources, but all reasonable probabilities, founded upon his position in society and surrounding circumstances that the debt, or any part of it, would have been discharged had he not escaped: *Macrae v. Clarke*, L. R. 1 C. P. 403. In that case it was held that the debtor, though solvent, might be shown to be the only son of a wealthy farmer, who was over a hundred years old; and that, shortly before his arrest, the debtor's solicitor had offered to pay a composition on his debts of six shillings in the pound, in order to estimate the value of his custody. In arriving at that value, no deduction should be made for anything which the plaintiff might have obtained by diligence after the escape: *Arden v. Goodacre*, 11 Com. B. 371.

**p. Arrest and Bail.**—Failure to execute a writ of arrest, if due to the want of proper and reasonable diligence, makes the officer liable, and the measure of damages is the loss actually sustained; and where the officer is told that the debtor is in some hotel in the city, and that the next day would be too late for service, and he was in a hotel and escaped from the state the next morning, the officer was held responsible: *Philips v. Ronald*, 3 Bush (Ky.), 244, 96 Am. Dec. 216. In an action for returning bail, when none had been taken, the insolvency of the debtor may be shown in mitigation of damages: *Eaton v. Ogier*, 2 Me. 46; but in *Goodrich v. Starr*, 18 Vt. 227, it was held that it might not, where the sheriff had allowed the writ to run out, as he became fixed with the debt.

For refusal to take sufficient bail legally offered, the sheriff is liable in an action on the case: *Gibbs v. Randlett*, 58 N. H. 407;



but he is not required to travel around with an arrested prisoner to enable him to procure it: Page v. Staples, 13 R. I. 306.

**q. Liability for Seizing Exempt Property.**

**1. The Two Kinds of Exemption.**—There is quite a conflict among the authorities as to the liability of the officer levying process for seizing such property as is exempt from execution. That there are two kinds of exemption, absolute and conditional, is remarked in *Frost v. Shaw*, 3 Ohio St. 270, and the difference between them is pointed out in the following language: "There are certain enumerated articles which are absolutely exempted from execution, and which the officer is bound, at his peril, to notice, and not take on execution unless turned out to him by the debtor waiving his right to the exemption. But there are other articles, . . . the exemption of which from execution, by the terms of the law, depends upon the selection to be made by the debtor at the time of the levy, if he be present; but if not present, he should make the selection, and notify the officer of the same, within a reasonable time thereafter and before the sale. Without such selection, the right to the benefit of the exemption does not exist as to those articles which the statute authorizes the debtor to select, and when no such selection has been made, it is the duty of the officer to proceed to levy on and sell the property." As to cases in which the articles were specifically exempt see *Woods v. Keyes*, 14 Allen, 236, 92 Am. Dec. 765; *Castile v. Ford*, 53 Neb. 507, 73 N. W. 945; *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219; and where property levied on is known to be exempt no demand is necessary before suit: *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79.

If the exemption depends upon the filing of an inventory and the selection of property, until these acts are done replevin will not lie against the officer: *Mann v. Welton*, 21 Neb. 541, 32 N. W. 599. Where property exempt from execution up to a certain amount is levied on, to protect himself the officer must cause an inventory and appraisalment of the whole of such property of the debtor to be made, and the amount exempt to be set out to the debtor: *Elliott v. Whitmore*, 5 Mich. 532; *Parker v. Canfield*, 116 Mich. 94, 74 N. W. 296; citing *Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. 815; *Hutchinson v. Whitmore*, 90 Mich. 255, 30 Am. St. Rep. 431, 51 N. W. 451; *Ostrander v. Packer*, 35 Mich. 430; *Town v. Elmore*, 38 Mich. 305. Where it is important to the debtor's business to have the benefit of his exemptions set off, the officer is bound to act promptly: *Handy v. Clippert*, 50 Mich. 355, 15 N. W. 507.

If a judgment debtor demands his exemption in time, and the sheriff refuses to allow it, he is liable: *State v. Kenan*, 94 N. C. 296; it is a personal privilege, and is waived by failure to exercise it: *Barton v. Brown*, 68 Cal. 11, 8 Pac. 517; and if not asserted in time, and in the manner provided by law, and by a person showing himself within the statute, is lost: *Boesker v. Pickett*, 81 Ind. 554.

In *State v. Boulden*, 57 Md. 314, it is held that the exemption must be claimed before the commencement of the sale, and if the debtor waits till the sale has begun his right is gone; but the officer is liable if he denies the debtor an opportunity to claim his exemption: *Shear v. Reynolds* 90 Ill. 238. In *Twinam v. Swart*, 4 Lans. (N. Y.) 263, the court held that the officer need not consult the judgment debtor as to what property was exempt before levy, but that he might take it if not informed of the exemption, which must be claimed within a reasonable time after the levy: See, also, *Sullivan v. Farley*, 11 Daly (N. Y.), 157. Where the law only gives a right to demand a homestead, it is necessary for the claimant to set it up and establish it, and the sheriff is not liable for levying thereon unless the right is demanded. No harm is done in making the levy, as it is usually the preliminary step to claiming the homestead: *Oliver v. White*, 18 S. C. 235. Where the debtor has the option of retaining oxen or a horse as exempt, and he refuses to choose, he cannot afterward complain if the sheriff takes the oxen and not the horse: *Davis v. Webster*, 59 N. H. 471.

A party is presumed not to waive the benefit of exemption made in his favor: *State v. Haggard*, 1 Humph. (Tenn.) 390; but where the property is exempted by law for the benefit and use of the family, it cannot be levied on even with the consent of the head of the family: *Denny v. White*, 2 Cold. (Tenn.) 283, 88 Am. Dec. 596; *Ross v. Lister*, 14 Tex. 469.

In Mississippi if the judgment debtor does not designate property claimed as exempt, it is the duty of the sheriff to summon three disinterested persons to determine it, and failure to do so renders him liable in trespass or case: *Perry v. Lewis*, 49 Miss. 443.

Under an Iowa statute the execution defendant need not notify the sheriff that he claims the property as exempt, before commencing suit: *Parsons v. Thomas*, 62 Iowa, 319, 17 N. W. 526.

In Missouri the officer must apprise the debtor of his right to exemption: *State v. Barada*, 57 Mo. 562; and the claim must be made before the sale: *Linck v. Troll*, 84 Mo. App. 49, citing *Garrett v. Wagner*, 125 Mo. 450, 28 S. W. 762; *Osborne v. Schutt*, 67 Mo. 712; *Weinrich v. Koelling*, 21 Mo. App. 133; *Statesbury v. Kirtland*, 35 Mo. App. 148; *Alt v. Bank*, 9 Mo. App. 91; *State v. Emerson*, 74 Mo. 607; *Drake on Attachment*, sec. 244a. Where, however, the debtor learns of his right in time to make the claim of exemption, he cannot recover from the sheriff for failure to apprise him thereof: *State ex rel. Bellemere v. O'Neill*, 78 Mo. App. 20.

**2. Actions Maintainable.**—For the unlawful refusal to turn over exemptions, trespass, trover, and replevin have each been held to lie: *Oliver v. Wilson*, 8 N. Dak. 590, 73 Am. St. Rep. 784, 80 N. W. 757. Where the officer fails to make out an inventory and allow the debtor to select, trover will lie: *Parker v. Canfield*, 116 Mich. 94, 74 N. W. 296. If the statute exempts a specified amount of a designated kind of property, the officer may levy upon the whole

property of that species, and cannot be sued in replevin before appraisal, selection by the owner to the specified amount, and a demand for the articles so selected: *Tullis v. Orthwein*, 5 Minn. 377 (Gil. 305). In *Elliott v. Whitmore*, 5 Mich. 532, replevin was brought, and the action sustained; property exempt from execution which is seized by an officer cannot be said to be "in the custody of the law," and replevin will lie: *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219. In such a case trespass may also be brought: *Davis v. Maloney*, 79 Me. 110, 8 Atl. 350; and where the officer seizes more property than he should, under the exemption laws, he is liable for the excess, but is not a trespasser ab initio: *Wentworth v. Sawyer*, 76 Me. 434. Case as well as trespass has been held to lie for selling exempt property in disregard of the defendant's claim: *Van Dresar v. King*, 34 Pa. St. 201, 75 Am. Dec. 643.

Where an officer seized all of a debtor's property, knowing part of it to be exempt, he was not allowed to justify by showing that the defendant did not designate any particular portion as not liable to seizure. The mere silence of a party, while an officer is stripping him of property exempt from seizure, under color of legal authority, cannot protect the officer: *Frost v. Mott*, 34 N. Y. 253. The return of the property seized is no defense, but may go in mitigation of damages: *Castile v. Ford*, 53 Neb. 507, 73 N. W. 945.

**3. As a Defense for not Levying.**—While liable to the defendant for seizing exempt property, the officer may have to answer to the plaintiff for not seizing the defendant's property, and in such case the fact that it was exempt is a good defense: *Moss v. Jenkins*, 146 Ind. 589, 45 N. E. 789, where it is stated to be the presumption that the debtor will claim his exemption before sale: But see *Baker v. Brintnall*, 52 Barb. 188. So where, after he has seized property, he releases it, it is also a good defense in which case he must show either that the property was, as a matter of law, specifically exempt from seizure, or that it was exempt under a statute at the election of the debtor, and that he exercised his right to have it declared exempt by complying with the requirements of the statute: *Johnson v. Bartek*, 56 Neb. 422, 76 N. W. 878. See, also, *Cilley v. Jenness*, 2 N. H. 87. Where the officer defends on the ground that the property was exempt the burden is upon him to prove it: *Bonnell v. Bowman*, 53 Ill. 460; *Sage v. Dickenson*, 33 Gratt. (Va.) 361.

### r. Seizing Property of a Third Person.

**1. The Writ as Protection.**—A writ directing an officer to seize property of the defendant in order to satisfy a judgment against him gives such officer no right to take the property of a third person. Where, by virtue of a writ against the defendant, an officer seizes goods belonging to, and in the possession of, a third person, the writ offers him no protection and he is liable: *Shuff v. Morgan*, 9 Mart. (La.) 592; *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121; *Ford v. Dyer*, 26 Miss. 243; *Vickery v. Crawford* (Tex.), 55 S. W. 560;

McDowell v. McCormick, 90 Fed. 393; and even though no particular property be specified, he is bound to know at his peril that it is the defendant's: *Meadow v. Wise*, 41 Ark. 285. If the goods of a person are in the hands of a common carrier and are seized by virtue of an attachment against the defendant, for refusing to surrender them on demand the officer is liable: *Bodega v. Perkerson*, 60 Ga. 516.

In regard to levying upon property in the possession of the defendant, the court in *Armstrong v. Bell*, 19 Ky. Law Rep. 1156, 42 S. W. 1131, said: "It is the duty of a sheriff, having in his hands an attachment against a defendant, to exercise diligence in hunting up the property of such defendant and levying upon it, and for any failure of diligence on his part in this respect he is liable to the party injured; and we take it to be a well-settled rule of law that the possession of personal property is prima facie evidence of ownership, and that it is the duty of the sheriff to levy upon all personal property found in the possession of a defendant in an attachment writ, unless he knows, or by reasonable diligence could discover, that it was not the property of such defendant (see *Murfree on Sheriffs*, sec. 965; *Shinn on Attachment*, secs. 210, 387; *Drake on Attachment*, sec. 199); and that he is not liable as a trespasser therefor unless he had notice of the true ownership of the property levied at the date thereof, or refused to deliver the possession of the property so levied upon after he received information as to the ownership of the third party, upon proper demand made."

There need be no manual taking, but a constructive seizure is sufficient: *Freeman v. Apple*, 99 Pa. St. 261; so in order that a chattel may be attached, it is only necessary that the officer have possession and control of it; and he need not remove or even touch it: *Morse v. Hurd*, 17 N. H. 246.

## 2. Defenses.

**A. Various Defenses.**—Where a third person claiming property gives notice of ownership and forbids the sale, it is tantamount to a demand and the officer is liable: *Vaughn v. Allgaier*, 27 Mo. App. 523; but where, at the sale of such goods, the owner is present and does not object thereto, the officer is not liable: *Lentz v. Chambers*, 5 Ired. (N. C.) 587, 44 Am. Dec. 63. An order of court directing the sheriff to seize certain specified property, which proves not to belong to the defendant, is no defense to the officer: *Rhodes v. Patterson*, 3 Cal. 469; nor is it where an attachment is issued on an insufficient affidavit, and he seizes property under it in the possession of mortgagees: *Mathews v. Densmore*, 43 Mich. 461, 5 N. W. 669. Where a sheriff, by direction of an execution creditor, seized the goods of a third person and held them until such creditor should institute proceedings under the interpleader act, after the claimant had established his title to the goods, the officer was not allowed to invoke these proceedings as a defense to acts of trespass committed before the commencement of such proceedings: *Zach-*



arias v. Totton, 90 Pa. St. 286. Where a sheriff is sued for the conversion of the plaintiff's property, it is no defense that he acted on an ex parte order made in a replevin action against the plaintiff's vendors, directing the warehouseman in charge of the goods to deliver to the sheriff the goods "stored with them by the defendants, or any of them," and that he voluntarily delivered the goods to the sheriff, where it appears that the goods were stored by the plaintiff, and not by the defendants, that they were not included in the property described in the replevin process, and that the warehouseman made the transfer to the sheriff against the plaintiff's protest: *Einstein v. Dunn*, 70 N. Y. Supp. 520, 61 App. Div. 195.

Where a statute provides that the sheriff is bound to levy execution on all property in the possession of the defendant, unless he receives notice from some other person that it belongs to him, a mere disclaimer by the debtor of any interest in the property does not require him to postpone the sale and make inquiries, and he is not liable to such third person for levying on the goods: *West v. St. John*, 63 Iowa, 287, 19 N. W. 238. If, under a statute, a jury is impaneled to try the title to property seized on execution, it is a defense to the officer if they find that it was subject to seizure as the defendants, although by mistake they find it was the "plaintiff's" in execution: *Schroeder v. Clark*, 18 Mo. 184.

Where the property taken is not in the possession of the defendant, the value of the writ as a defense is stated in *Oberfelder v. Kavanaugh*, 21 Neb. 483, 32 N. W. 295, in the following words: "Drake, in his valuable work on Attachment states the law as follows: 'When the officer attaches property found in the possession of the defendant he can always justify the levy by the production of the attachment writ, if the same is issued by a court or officer having lawful authority to issue it, and be in legal form. But when the property is found in the possession of a stranger claiming title, the mere production of the writ will not justify its seizure thereunder; the officer must go further and prove not only that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued': Drake on Attachment, 6th ed., sec. 185a. The above is adopted by the author almost literally from the opinion of the court in *Thornburgh v. Hand*, 7 Cal. 554, and is sustained by other authorities cited: *Noble v. Holmes*, 5 Hill (N. Y.), 194; *Van Etten v. Hurst*, 6 Hill, 311, 41 Am. Dec. 748; *Mathews v. Densmore*, 43 Mich. 461, 5 N. W. 669." See to the same effect, *Williams v. Eikenberry*, 25 Neb. 721, 17 Am. St. Rep. 517, 41 N. W. 770. If taken under an execution, a judgment must be shown: *Newton v. Brown*, 2 Utah, 126.

**B. Fraudulent Conveyances.**—If an officer seizes goods ostensibly belonging to a third person, but in reality transferred by the judgment debtor in fraud of creditor, such fraudulent conveyance may be shown, and it will be a justification to him: *Ellsassar v. Hunter*,

26 Cal. 279. In such a case the fact that the officer acted under process regular on its face is not enough to protect him, but he must show the relation of debtor and creditor between the parties; in the case of an attachment he must show a debt, in the case of an execution, a judgment; and he must go back of the process and show that the preliminary steps were regular if he wishes to set up fraud: *Pease v. Anderson*, 44 Ill. 218; *Damon v. Bryant*, 2 Pick. (Mass.) 441; *Hines v. Chambers*, 29 Minn. 7, 11 N. W. 129; *Howard v. Manderfield*, 31 Minn. 337, 17 N. W. 946; *Ford v. McMaster*, 6 Mont. 240, 11 Pac. 669; *Keys v. Grannis*, 3 Nev. 548; *Noble v. Holmes*, 5 Hill (N. Y.), 194; *Jansen v. Acker*, 23 Wend. 480; *Bogert v. Phelps*, 14 Wis. 88. The reason for this is well stated in *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441, where, speaking of the sheriff, the court said: "He comes here representing creditors, and they may avoid the sale on account of its fraudulent character as to them. But the sale is valid between the parties, and none but creditors can avoid it. But every person who chooses to bring a suit is not therefore a creditor, for something more than his allegation is necessary in order to prove his debt. Creditors, or persons calling themselves such, must prove their debts, and until this is done, they have no right to interfere. If then creditors can interfere only on proof of an indebtedment by the alleged owner of the property the sheriff, who is an agent merely, can have no rights greater than those of the principal whom he represents. If a sheriff take my goods by virtue of a writ, his process will be a sufficient justification in an action of trespass which I might bring against him. It would be a sufficient warrant for his interference. But if he takes goods in my possession on the ground that my title is a voidable one, he must show that he has a right to avoid it. And as in the present case his right to interfere depends on the existence of a debt in favor of the attaching creditor, he was bound at least to make out a prima facie case of indebtedment": See, also, *Thornburgh v. Hand*, 7 Cal. 554. The same rule also applies to attachments: *Rinchev v. Stryker*, 28 N. Y. 45, 84 Am. Dec. 324.

Where, however, the officer seized property under an attachment, which was afterward set aside as wrongfully obtained, it was held that the officer could not justify the seizure upon the ground that the sale and transfer to the plaintiff were fraudulent, as, after the discharge of the attachment, the officer had no special title in or to the goods seized, had no judgment, or execution, or any valid process to justify his possession and was therefore in no position to question the bona fides of the plaintiff's title: *Simpson v. Vose*, 31 Kan. 227, 1 Pac. 601. So, where the goods are seized on a valid writ of attachment and sold upon an execution issued upon a void judgment rendered in the attachment suit, the officer cannot justify under the writ of attachment in an action of trover, by showing a fraudulent sale as to creditors: *Trowbridge v. Bullard*, 81 Mich. 451, 45 N. W. 1012.

Where a sheriff has levied on growing crops after land has been conveyed by the execution debtor, and he afterward takes possession of the harvested crop, he may show as a defense that the conveyance was fraudulent as to the creditor in his execution, and need not have the conveyance set aside in a direct proceeding; this was attempting, in an indirect manner, to place the crops beyond the reach of his creditors: *Pierce v. Hill*, 35 Mich. 194, 24 Am. Rep. 541.

A judgment may be impeached as fraudulent by a sheriff in a suit brought against him for not levying execution under it, where he proves he represents a creditor of the judgment debtor, and shows a legal precept from him: *Clark v. Foxcroft*, 6 Me. 296, 20 Am. Dec. 309.

As to evidence of fraudulent conveyance, see *Sanders v. Chandler*, 26 Minn. 273, 3 N. W. 351; *Homburger v. Brandenburg*, 35 Minn. 401, 29 N. W. 123.

### C. Intermingled Property.

(1.) **Liability to Seizure.**—It is a good defense to a levying officer that the goods seized were fraudulently intermingled with those of the defendant in the execution, for the purpose of hindering or defrauding creditors, and will justify him in seizing the property of a third person; and in such case the burden is on such person to identify his goods in order to exempt them from seizure: *Weil v. Silverstone*, 6 Bush (Ky.), 698. Where, however, there is no fraud, the officer levies on them at his peril: *Foote v. People*, 14 Ill. App. 280; and if the owner of the goods which have been mingled with those of the defendant alone can distinguish them and refuses, on request, to select his goods, if there is no fraud, his property may not be taken by the creditor: *Treat v. Barber*, 7 Conn. 274. In *Carlton v. Davis*, 8 Allen, 94, it is held to be the duty of the officer to ascertain, if possible, what portion of the goods belongs to each, and not to attach the whole without making inquiry: See, also, *Smith v. Sanborn*, 6 Gray, 134. It is held in *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233, that if the party intermingling his goods does not himself identify and point them out, the officer is justified in taking and selling all as the debtor's property.

Where the goods are so intermingled as not to be distinguishable, a previous demand upon the officer is necessary before an action can be maintained; but it is not necessary that the property should be so distinctly marked that an officer by his own observation would be able to see that it did not belong to the same individual, in order to render him liable: *Tufts v. McClintock*, 28 Me. 424, 48 Am. Dec. 501. In *Lewis v. Whittemore*, 5 N. H. 364, 22 Am. Dec. 466, it was held that trespass would not lie for the original taking; but that after demand trover might; and in *Wilson v. Lane*, 33 N. H. 466, that no liability would attach until the goods were identified and pointed out to the officer and return demanded: See,

generally, *Slattery v. Stewart*, 45 Ill. 293; *Sharp v. Lamy*, 55 N. Y. Supp. 784, 37 App. Div. 136. See, as to evidence of fraudulent comingling, *Davis v. Stone*, 120 Mass. 228.

(2.) **Tenants in Common.**—A levy by a sheriff on property of tenants in common, for a debt due from one of them, does not make him liable to the other, although he takes the property into his possession: *Veach v. Adams*, 51 Cal. 609; but he can sell only the interest of the debtor: *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147. In *Sheppard v. Shelton*, 34 Ala. 652, the officer was held to be a trespasser *ab initio*; but in *Heald v. Sargeant*, 15 Vt. 506, 40 Am. Dec. 694, the opposite view was taken, the court there holding that in such a case the officer does not abuse the same authority upon which the goods were originally taken, and therefore there could be no trespass *ab initio*.

(3.) **Partnership Property.**—A sheriff cannot levy on specific partnership property to satisfy an execution against one of the partners only, but the levy should be on his individual interest in the whole stock: *Sirrine v. Briggs*, 31 Mich. 443. But see *Knox v. Summers*, 4 Yeates (Pa.), 477. Where the partner's interest is levied on, the officer is entitled to reduce the property to possession, but can sell only the debtor's interest therein: *White v. Jones*, 38 Ill. 159.

### 3. Remedies.

**A. Common-law Actions.**—The remedies allowed an owner of property, which has been seized under execution or attachment against another, are manifold. Trespass is the most usual form of action: *Moore v. Winter*, 67 Ark. 189, 53 S. W. 1057; and this will lie although the owner came into court in the attachment case, filed his plea claiming the property, and recovered judgment for restitution: *Trieber v. Blocher*, 10 Md. 14. It has also been held that trover may be maintained: *Yockey v. Smith*, 181 Ill. 564, 72 Am. St. Rep. 286, 54 N. E. 1048; *detinue*: *Owings v. Frier*, 2 A. K. Marsh. (Ky.) 268, 12 Am. Dec. 393; *replevin*: *Phillips v. Harris*, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166; and case, as well as the statutory trial to the right of property: *Pike v. Colvin*, 67 Ill. 227. Where an indemnity bond has been given, the owner is not confined thereto, but may bring trespass or trover: *State v. McBride*, 81 Mo. 349.

A previous demand for the goods seized was held not essential in the following cases: *Moore v. Murdock*, 26 Cal. 514; *Boulware v. Craddock*, 30 Cal. 190; *Hanchett v. Williams*, 24 Ill. App. 56; *Jamison v. Hendricks*, 2 Blackf. (Ind.) 94, 18 Am. Dec. 131; *Woodbury v. Long*, 8 Pick. (Mass.) 543, 19 Am. Dec. 345. Where in the apparent possession of the defendant, a demand was required in *Daumiel v. Gorham*, 6 Cal. 43; *Killey v. Scannell*, 12 Cal. 73; *Armstrong v. Bell*, 19 Ky. Law Rep. 1156, 42 S. W. 1131.



**B. Statutory Actions.**—Where a third person claims the goods levied on and prosecutes his claim under a statute providing for the summoning of a jury to try the title to the property, he cannot afterward sue the sheriff in trespass for taking the same goods, as choosing one remedy waives the right to another: *Patty v. Mansfield*, 8 Ohio, 369; *Capital Lumbering Co. v. Hall*, 9 Or. 93; nor can he, after electing the statutory remedy, abandon it and resort to another one: *Moore v. Gammel*, 13 Tex. 120. Such summary remedy, however, can be had only at the instance of the claimant, and not at that of the sheriff, against the claimant's desire: *Jones v. Carr*, 16 Ohio St. 420.

**4. Damages.**—Where the property of a stranger to the writ is wrongfully attached, he is entitled to recover the entire value of the property at the time when so seized; and the fact that the officer tendered a return of the property the next day will not mitigate the damages: *Carpenter v. Dresser*, 72 Me. 377, 39 Am. Rep. 337. But where the plaintiff, whose goods were seized, bought in the property at the sale, the measure of damages is not the full value of the property, but the expense and loss they were put to in getting it back, including any loss by its seizure and detention, and the price which they paid to the sheriff: *Hyde v. Kiehl*, 183 Pa. St. 414, 38 Atl. 998. For wrongfully attaching the goods of a merchant, removing most of them, and retaining them for three months, the loss of profits and the loss of credit should be compensated for, and are a part of the damages sustained: *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. Rep. 661, 76 N. W. 524.

**5. Property in Stranger as Defense for not Levying.**—When sued for not levying on the goods of a debtor, the sheriff may show by way of defense that the title thereto was in another: *Canada v. Southwick*, 16 Pick. 556. Where he levies execution upon property not belonging to the defendant, as soon as he learns of it, he is bound to stop all further proceedings, and is not liable for so doing: *State v. Swigart*, 22 Ark. 528. So if the property attached turns out not to have been the debtor's, at the time of the attachment, the officer is exonerated from liability to have it forthcoming on execution: *French v. Stanley*, 21 Me. 512.

### s. Indemnity.

**1. Right to Demand.**—If a sheriff, to whom process has been given for service, entertains a doubt as to the title to the property to be levied on, he may demand indemnity, and is under no obligation to act unless given: *Marsh v. Gold*, 2 Pick. (Mass.) 285; *Smith v. Osgood*, 46 N. H. 178. For arbitrary or capricious refusal to act without indemnity he is liable: *Robey v. State*, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405, and note; and when sued for a false return it is no defense that indemnity was not tendered, where it is not shown that it was needed: *Craft v. Brandow*, 52 N. Y. Supp. 1078, 24 Misc. Rep. 306. Even though given a bond of in-

demnity by the plaintiff, if the goods turn out to belong to a third person, the officer is still liable to him, as the bond neither lessens, nor adds to, the obligations and duties imposed on him by law: *James v. Thompson*, 12 La. Ann. 174.

If the plaintiff is of unquestionable sufficiency, the sheriff cannot demand additional security: *Harrison v. Allen*, 40 N. J. L. 556, in which case the court said: "The rule is well settled that when personal property, upon which a sheriff is instructed to levy, is claimed by a third party, the officer is not bound to proceed with the writ unless the plaintiff furnish him with ample indemnity: *Crocker on Sheriffs*, sec. 464; *Freeman on Executions*, sec. 275. But no case has been referred to, and none has come under my observation, that maintains the doctrine that under all circumstances the sheriff has the right to require a surety to the bond rendered to him. Such a rule would be needlessly oppressive to a plaintiff in execution. If such plaintiff is possessed of so much property as to make his own obligation complete security to the officer, there can be no reason why the latter should have it in his power to exact anything beyond such personal obligation. The officer has a right to be fully protected; but when such full protection is tendered to him he must accept it, and has no right to require anything more."

No implication of indemnity arises from the mere placing of process in the hands of an officer, without directions to execute it in a particular manner: *Nelson v. Cook*, 17 Ill. 443; note to *Arnold v. Fowler*, 94 Md. 497, 51 Atl. 299, 89 Am. St. Rep. 444, and note; but where the plaintiff points out property to be levied on it is indemnity, and if it is not sufficient the officer is bound to object at once, that the objection may be met and removed: *Mullings v. Bothwell*, 29 Ga. 706; *Levy v. Shockley*, 29 Ga. 710. If after notice of an adverse claim to the property the sheriff does not demand indemnity, he is liable if the goods belong to the defendant: *Miller v. Commonwealth*, 5 Pa. St. 294. In *Patterson v. Anderson*, 40 Pa. St. 359, 80 Am. Dec. 579, it was held that where indemnity was refused when levying on partnership property under a writ against one partner, the sheriff might return nulla bona, or refuse to sell anything but the defendant's interest in the property. As to the right to demand indemnity at common law, see *State v. Koontz*, 83 Mo. 323.

**2. Indemnity as Estoppel to Plead Title in Stranger.**—Although there are some authorities against it, the better rule, and the stronger numerically, is that the giving of indemnity to an officer does not estop him from denying the defendant's title to the property, for, as is pointed out in *Hamblet v. Herndon*, 3 Humph. (Tenn.) 34: "It is absurd to sue a man for a false return, and then refuse to permit him to prove that the return was true." In accord are *Wadsworth v. Walliker*, 45 Iowa, 395, 24 Am. Rep. 788; *Dolson v. Saxton*, 11 Hun (N. Y.), 565, overruling *Curtis v. Patterson*, 8 Cow. (N. Y.) 65; *Commonwealth v. Watnrough*, 6 Whart.

(Pa.) 117; *Commonwealth v. Vandyke*, 57 Pa. St. 34; *Freiberg v. Johnson*, 71 Tex. 558, 9 S. W. 455. So it is a good defense, even though indemnity is offered, for the sheriff to show that there are liens on the property in excess of its value: *Phelps etc. Co. v. Skinner*, 63 Kan. 364, 65 Pac. 667. In *Evans v. Thurston*, 53 Iowa, 122, 4 N. W. 895, a distinction is made between where indemnity is offered for the seizure of property on execution and where offered upon attachment proceedings; in the former case it is held he cannot show the goods to belong to a third person, while in the latter he can, and on that ground distinguishing it from *Wadsworth v. Walliker*, 45 Iowa, 395, 24 Am. Rep. 788.

For cases holding that the officer is estopped see *Bayley v. Bates*, 8 Johns. (N. Y.) 185; *Van Cleef v. Fleet*, 15 Johns. (N. Y.) 147; *Corson v. Hunt*, 14 Pa. St. 510, 53 Am. Dec. 568; *Stone v. Pointer*, 5 Munf. (Va.) 287.

**t. Use of Force.**—As to what right an officer has to break into a house in executing civil process, is stated by the Texas court, in *Hillman v. Edwards* (Tex. Civ. App.), 66 S. W. 788: "It is a well-settled rule of common law that in the execution of civil process an officer is not authorized to break open an outer door, or raise a window, or forcibly enter the dwelling-house of the defendant in execution, used and occupied as such by him, without his consent. If he gains admission without force, he may go from room to room, or forcibly enter an inner door, or break open trunks, wardrobes, etc., for the purpose of a necessary levy: 2 *Freeman on Executions*, par. 256; *Murfree on Sheriffs*, par. 268; *Kelley v. Schnyler*, 20 R. I. 432, 78 Am. St. Rep. 887, 39 Atl. 893; *Ilseley v. Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; *Swain v. Mizner*, 8 Gray (Mass.), 182, 69 Am. Dec. 244; *Snydacker v. Brasse*, 51 Ill. 357, 99 Am. Dec. 551; *People v. Hubbard*, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950."

Where an officer takes possession of a store under a writ of attachment and excludes the owner, it is a trespass, for which he is liable: *Holland v. Anthony*, 19 R. I. 216, 36 Atl. 2. In justifying an assault committed in levying an attachment, the officer must plead and prove title to his office and cannot show it under the general issue: *Smith v. Wilson*, 21 R. I. 327, 43 Atl. 634.

An officer shooting a fleeing misdemeanant, who is attempting to escape from arrest, is liable: *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. Rep. 512, 23 South. 388.

**u. Liability for Lynching of Prisoner.**—In the absence of a malicious intent, a sheriff is not liable for damages for the death of a prisoner caused by a lawless mob, although he was warned of the outrage, and was present and offered no resistance: *State v. Wade*, 87 Md. 529, 40 Atl. 104.

**v. Liability to Surety.**—Where an execution against two does not distinguish which is the principal and which the surety, the

sheriff has a right to collect it from either, and the surety has no cause of action against him for collecting it from him, although directed by the plaintiff to collect it from the other. The officer had the right to go by the writ, in which they were not distinguished: *Shuford v. Cline*, 13 Ired. 463; nor is an officer liable to a surety for omitting to levy on the property of the principal, or for making a false return of no property, although by such omission the surety was compelled to satisfy the judgment, for the officer owes the surety no duty at common law and so is not responsible to him: *Gregg v. Crawford*, 4 Ala. 180, 37 Am. Dec. 739. Mere personal knowledge of the sheriff, or personal notice to him, of the fact of suretyship, does not charge him with the duty of first levying upon the property of the principal and exhausting that before levying on the goods of the surety; and if the law provides for a trial of the question of suretyship, that must be first had before any liability will attach to the sheriff: *Bliss v. Douch*, 110 Ind. 296, 11 N. E. 293.

Where, on the dissolution of an injunction, execution was issued for the principal debt, and was placed in the hands of a sheriff, to whom the defendant delivered property to be sold for the payment of the debt, and the sheriff left it in the defendant's possession, and it was removed from the state and the defendant proved insolvent, the sheriff was held liable to the surety in the injunction bond, who was forced to pay the debt: *Rowe v. Williams*, 7 B. Mon. (Ky.) 202.

**w. Deputy Sheriffs.**—As to third persons, the official acts of deputy sheriffs are the acts of the sheriff: *Jameson v. Mason*, 12 Vt. 599; and for their acts and omissions in the performance of duties imposed by law he is liable, and is released only if a discretion is intrusted by the creditor to the deputy, who acts under it: *Mason v. Ide*, 30 Vt. 697; and an attachment by a deputy sheriff is an official act for which the sheriff is liable: *Rider v. Chick*, 59 N. H. 50.

In *Buck v. Ashley*, 37 Vt. 475, the distinction between the liability of a deputy sheriff for misfeasance and for nonfeasance is pointed out. In the former case he is responsible, but not in the latter, for if nonfeasance be the basis of the action, as not providing a suitable place for goods attached, the sheriff only can be sued, and not the deputy.

For the acts of his deputy trespass *vi et armis* lies against a sheriff: *Grinnell v. Phillips*, 1 Mass. 530; and such trespass is in law considered to have been committed by him and need not be charged as having been committed through the deputy: *Hirsch v. Rand*, 39 Cal. 315.

## **x. Summary Remedies.**

**1. Rule or Amercement.**—Not only may a sheriff be sued for a dereliction of duty, in a civil action, but a more summary and less

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lengthy remedy is also left open to him, and this is by rule or amercement, which every court has the inherent power to grant for failure to carry out its orders: *Nagle v. Lumpkin*, 48 Ga. 521; *Crawford v. Williams*, 76 Ga. 792; *Fisher v. Franklin*, 38 Kan. 251, 16 Pac. 341. To fix the sheriff's liability by rule two things are necessary—contempt of court in not executing its process, and injury to the plaintiff. The nature of a rule is explained clearly and concisely in *State v. Sheriff*, 1 Mill (S. C.), 145, in the following words: "It is certainly the duty of a sheriff, as well as every other officer, who undertakes the duties of an office, to perform them faithfully and punctually; and if he does not do those duties, then he becomes responsible. This responsibility is of a twofold nature—to the state as a public officer, and to the individual who suffers by his misconduct. To the state he is responsible for not performing the duties of his office. . . . To the individual he is liable by action at law, for consequential damages, in all cases of neglect, or omission in office, in which a jury will give a verdict commensurate with the nature of the injury the defendant has sustained by the misconduct of the sheriff. In all cases, however, where the facts of the case are plain and obvious, and where they can be ascertained to a great degree of certainty, and it is evident and notorious that a sheriff has been negligent, or obviously refuses to do his duty, in such cases the court will, for the sake of speedy justice, punish by attachment. But, in intricate and difficult cases depending on law or fact, or on both combined, the court will leave the parties to their remedies at law, when an opportunity will be afforded of fully investigating those facts and circumstances, agreeably to the rules of law, and where each party will have justice meted out to them by the country": See, also, *Ex parte Robertson*, 27 Tex. App. 628, 11 Am. St. Rep. 207, 11 S. W. 669.

It has been held that a rule upon a sheriff for neglect of duty is a remedial process, and not penal, and is given a plaintiff in lieu of his debt, in the nature of a civil action: *Hustick v. Allen*, 1 N. J. L. 168; but it is more often considered as highly penal in its nature, as depriving a person of a jury trial, and so to be strictly construed: *Bushnell v. Eaton*, *Wright* (Ohio), 720; *Duncan v. Drakeley*, 10 Ohio, 45; *Bank of Gallipolis v. Domigan*, 12 Ohio, 221, 40 Am. Dec. 475; *Watkins v. Barnes*, 1 Sneed (Tenn.), 201. The sergeant at arms of a district court is not liable for a statutory penalty for not performing duties imposed by law upon constables: *Nixon v. Fithian*, 61 N. J. L. 4, 38 Atl. 698.

An attachment for contempt in not paying over money or in not collecting it is in effect a civil proceeding of a summary nature, and after it is resorted to, the officer cannot afterward be sued in a civil action for detention: *Daniel v. Capers*, 4 McCord, 237; and whatever defense might be made by the officer when sued in an action on the case may be used as a defense in proceedings by motion for a rule: *Billingsly v. Rankin*, 2 Swan, 82.

The foundation of a rule absolute is the contempt of court in not obeying its orders, and it will not be enforced by attachment, but be set aside, if it appear that the officer is not really liable, and judgment on a rule is always open for this purpose, under the discretion of the court, and is not final and conclusive as if rendered between parties litigant: *Holcombe v. Dupree*, 50 Ga. 335; *Wakefield v. Moore*, 65 Ga. 268. Until the sheriff shows that he has used all means in his power to repair the damage due to his default, the attachment will not be set aside: *Pitman v. Clarke*, 1 *McMull*. 316; but it should be if the party suing out the attachment has suffered neither delay nor loss, upon the officer doing what he should have done in the first instance: *M'Lean v. Du Bose*, 1 *Bail*. 646.

Where a judgment nisi for a hundred dollars is rendered against a sheriff for failure to make a return, and no sufficient excuse is shown, the judgment should be made absolute: *Graham v. Sturgill*, 123 N. C. 384, 31 S. C. 705; and proof that the writ was directed by the clerk to the sheriff of another county, and mailed in due time to reach him in the ordinary course of mail, was held sufficient prima facie evidence to authorize the entry of a judgment for an amercement, nisi, if there was no return of process: *State v. Latham*, 51 N. C. (6 Jones) 233.

In Texas a statute provides that an officer failing to levy execution shall be liable for the debt and interest to be recovered on motion: *Murray v. Evans* (Tex. Civ. App.), 60 S. W. 786; and where a statutory penalty of ten per cent is given for failure to pay over money collected, it was held that it could be enforced only by motion: *Scogins v. Perry*, 46 Tex. 113. Failure to make money on a fieri facias, when by due diligence it might have been made, is "failure to execute process," for which a sheriff may be ruled: *Andrews v. Keep*, 38 Ala. 315. In *Davis v. Irwin*, 8 Ga. 153, a sheriff sold a slave under an execution, and delivered it with the understanding that he was to receive a check at a bank the next day; in the meantime the slave ran away and the check was refused; and the sheriff was held liable to be ruled for the balance of the purchase money.

An attachment against an officer should be awarded only for willful default, and where he fails to pay over money, not from corruption or neglect, but because of a well-grounded doubt, he should be sued in an action at law, and not by rule: *Wilson v. Broder*, 10 Cal. 486; *Custer v. Agnew*, 83 Ill. 194; *Mongie v. Cheney*, 1 Hill (S. C.), 145; *Corry v. Tate*, 48 S. C. 548, 26 S. E. 794.

For failure to return a writ, a sheriff may be amerced at a subsequent term of court: *Holcombe v. Rowland*, 30 N. C. (8 Ired.) 240; *Hyatte v. Allison*, 48 N. C. (3 Jones) 533; and he is still liable to amercement, though his term of office has expired: *Bell v. Thorpe*, 44 Ga. 509; *Armstrong v. Grant*, 7 Kan. 285; *Hus'ick v. Allen*, 1 N. J. L. 168. But see *State v. Woodside*, 29 N. C. (7 Ired.) 296.

It is sometimes required that, before making the motion for a rule, notice in writing be given, the purpose of which is to give the officer opportunity to prepare to resist it, if undeserved, or to prevent it by payment: *State v. Judges, etc.*, 10 N. J. L. 319; such notice is operative from the time of service, regardless of date: *Scott v. Dow*, 14 N. J. L. 350. It is not sufficient notice of motion to amerce to assign as grounds "for not executing writ of executions"; it must assign neglect or refusal to execute it: *Stryker v. Merseles*, 24 N. J. L. 542. Motion against a sheriff for failing to make a return is not sustained by an insufficient or false return: *Watkins v. Barnes*, 1 Sneed (Tenn.), 201.

A sheriff may show, in a rule for failure to levy on property, that the plaintiff has been paid on the fieri facias since the judgment money not credited thereon, and thus show less injury to the plaintiff; and it is error to make the rule absolute for the whole sum apparently due on the face of the writ: *Wheeler v. Thonras*, 57 Ga. 161.

It is only the person injured who can obtain a rule. Thus, a rule against a sheriff for surrendering property, without taking a bond as required by law, is a judgment in favor of the attaching creditor for the injury done to him, and a prior attaching creditor has no claim for the money so paid, as it does not belong to the judgment debtor, and is not the proceeds of the property: *Ford v. Perkerson*, 59 Ga. 359.

2. **Constitutionality.**—A statute authorizing summary proceedings by motion against a sheriff for official misconduct, does not violate the constitution by denying a trial by jury: *Wells v. Caldwell*, 1 A. K. Marsh. (Ky.) 441; *Lewis v. Garrett*, 5 How. (Miss.) 434, in which latter case the court, speaking of the power to punish by attachment said: "This power is essential not only to preserve the just authority and respectability of courts, but to subserve the ends of justice. This being, then, one of the attributes of all courts of justice, by the immemorial sanctions of the common law, and essentially necessary for their preservation, the statute which conferred the power on the court to render the judgment in the present case is no infringement of the constitutional rights of the sheriff. It merely regulates the mode of the exercise of the power inherent in the court, of punishing its own officer for a contempt, and makes that power auxiliary to the just rights of the party who has been injured."

## VII. Inspectors.

The duties of an inspector are usually regarded as ministerial, for a failure to perform which they are liable to all whom they injure. Where a city ordinance requires the building inspector to inspect buildings in the course of construction and to see that they are being constructed as provided by ordinance, a duty is imposed on him to enforce obedience from builders, for a neglect of which he is liable in damages to one injured by the falling of a building con-

structed in a careless and negligent manner: *Merritt v. McNally*, 14 Mont. 228, 36 Pac. 44. So where a statute provides that an inspector falsely branding oil tested shall be liable for the injuries caused thereby, he is liable, irrespective of whether he actually knew that the brand was false: *Hatcher v. Dunn* (Iowa), 66 N. W. 905. And if an inspector affixes his brand to an article, without knowing its condition, he is responsible for all injuries occasioned thereby to a person purchasing upon the credit of the brand: *Nickerson v. Thompson*, 33 Me. 433; in *Gordon v. Livingston*, 12 Mo. App. 267, however, it was held that a grain inspector's liability for a false certificate, negligently, but not fraudulently given, did not extend to a purchaser of the grain who bought upon the faith of the certificate, but with whom the inspector had not contracted, on the ground that to constitute actionable negligence the person causing the injury must owe a duty to the person sustaining the loss.

An inspector of pork is personally responsible for want of ordinary diligence in the discharge of his official duties; and where he certifies a quantity of pork as of a certain quality, he is responsible for its being so not only at the date of his certificate, but for its remaining so for the length of time during which the article is usually expected to continue in that condition, if properly taken care of; and, in consequence of its being of an inferior quality, the purchaser may recover from him the amount of any loss sustained, on a resale of the article: *Tardos v. Bozant*, 1 La. Ann. 199.

An inspector of fish is liable for damages occasioned by want of reasonable skill, care, and fidelity on the part of his deputies, in the discharge of their duties, but not for their mere errors of judgment: *Pearson v. Purkett*, 32 Mass. (15 Pick.) 264. So the powers and duties of a fish inspector to inspect fish offered for sale in a city and to destroy all such as are unwholesome and unfit to be eaten are judicial, for a careless, improper, or erroneous performance of which he is not liable, so long as acting within his jurisdiction: *Fath v. Koepfel*, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539.

Although a statute regulating the inspection of beef and pork imposes a penalty upon the inspector, one-half to go to the use of the town where the offense is committed, and the other to the use of the person suing for the same, a person injured by the inspector's neglect of duty may recover damages sustained thereby in action on the case: *Hayes v. Porter*, 22 Me. 371; for "where the law has affixed forfeitures for certain infractions thereof or for neglects in not conforming to its requirements, whereby individuals are injured, they are not in consequence thereof deprived of the remedy, which would exist if no penalties were prescribed."

In *Miller v. Ouray Elec. etc. Co.* (Colo. App.), 70 Pac. 447, it was held that a statute, providing that it should be the duty of the county commissioners to make personal examination of the jail of their county during each session of the board, and correct all irregularities



and improprieties there existing, imposed a duty due to the public alone, and that the failure of the county commissioners properly to inspect the electric wiring of the jail, by reason of which the jail burned down and a prisoner was killed, did not render the county commissioners individually liable for such death.

#### VIII. Notaries Public.

The liability of notaries public for official acts or omissions is fully treated in the note to *Joost v. Craig*, 82 Am. St. Rep. 380, and will, therefore, be omitted here.

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### CURTIS v. RICHARDS.

[4 Idaho, 434, 40 Pac. 57.]

**JUDGMENTS—Final—Change of Attorneys.**—A judgment on a motion to change attorneys in a pending action is final, and an appeal may be taken therefrom. (p. 136.)

**ATTORNEY AND CLIENT.**—An attorney is more than a mere agent of his client. He is also an officer of the court, and within his sphere and in the line of his special powers, he is as independent as the judge of the court, and has not only his duties and obligations to the court and to his client, but he has rights and powers, entirely different from, and superior to, an ordinary agent. (p. 136.)

**ATTORNEY AND CLIENT—Change of Attorney—Right to Compensation.**—A person has no right arbitrarily to change his attorney without paying or securing fees earned, and the original attorney is not bound to consent to a substitution, or deliver papers upon which he has a lien, until the amount of his just demands is ascertained by a court or referee, and paid or secured. (p. 137.)

A. A. Fraser and W. E. Borah, for the appellant.

M. C. Athey and W. H. Clagett, for the respondent.

**435 MORGAN, C. J.** This is a proceeding under section 3999 of the Revised Statutes of Idaho. The original action from which this arose was one wherein Richard Cable was plaintiff and William B. Knott was defendant, then pending in the district court in and for Ada county, in which the petitioners, who are attorneys at law, were employed by the defendant to act as his attorneys in defense of his rights in said suit, and they acted as such from the twenty-fifth day of January, 1894, until the fifteenth day of February, 1895, when defendant served a notice upon said attorneys that he discharged them as attorneys in said action, to which notice petitioners replied that, as a condition precedent to said discharge, they required him to pay their fees in said cause, or secure the same. There-

upon the defendant in said cause filed a motion asking that petitioners be discharged by order of the said court. The allowance of this motion was resisted by the petitioners for the reason <sup>436</sup> that defendant had not shown any dereliction of professional duty on the part of the said attorneys in the defense of said suit, nor had he paid or secured the fees of said attorneys for services rendered in said cause. Upon the hearing of said motion the district court finds as follows: "That there has been (1) no dereliction of duty on the part of said attorneys in defense of said cause; (2) that there exists between said defendant and his said attorneys such a condition of mutual ill-will as will prevent them from acting together properly in the confidential relation of attorneys and client; and ordered that said motion of said defendant to change his attorneys of record be granted"—to which order defendants excepted, and bring said matter to this court on a writ of error.

Counsel for respondent contends that this court has no jurisdiction to review the action of the court below herein. Section 3999 of the Revised Statutes of Idaho gives the district court authority to order a change of attorney upon the application of the client, after notice to the attorney at any time before judgment or final determination. In this case the defendant filed a motion asking for an order changing his attorneys and substituting M. C. Athey as the attorney for said defendant. This motion, as is stated above, was resisted for the reasons given. This, then, became a special proceeding for the removal of said attorneys, in which the defendant in the court below was the proponent and these attorneys were defendants. By the provisions of subdivision 1 of section 4807 an appeal may be taken to the supreme court from a final judgment in an action or special proceeding commenced in the court in which the same is rendered. As to these parties (the attorneys) this judgment is final; they are dismissed from this case absolutely. The petitioners therefore have a right to bring their cause to this court for review.

It is further contended that the attorney is simply the agent of his client. To a certain extent, this is true; but he is more than an agent. He is also an officer of the court, and within his sphere and in the line of his special powers he is as independent as the judge of the court, and has not only his duties <sup>437</sup> and obligations to the court and to his client, but he has rights and powers entirely different from and superior to an

ordinary agent. An agent receives his orders from, and is directed absolutely and wholly by, his principal, in the management of his business. On the other hand, the business of the client which is submitted to his attorney is managed entirely by the attorney, and the client is advised and directed by him. As to the business committed to his care, the attorney is the sole manager and director. Hence, his responsibilities, are much greater than those of an ordinary agent. His reputation and his abilities are at stake to some extent in every case he undertakes. Hence, the law says the client shall not discharge him arbitrarily in the midst of the performance of his duties. But, if you desire to change attorneys, you may do so with the consent of the court in a proper proceeding. As in this case the court examines into the reasons for said change, and when he ascertains that the attorney has prosecuted his client's business to the best of his ability and with fidelity to the trust imposed upon him, he so finds. Then, if the substitution is made, there is no reflection upon the ability or faithfulness of the attorney. As to his right to fees or security for the same as a condition precedent to his discharge, the law says—and this court is in accord with this view—"that a party has no right arbitrarily to change his attorney without paying or securing fees earned, and the original attorney is not bound to consent to a substitution, or deliver papers upon which he has a lien, until the amount of his just demands is ascertained by a court or referee, and paid or secured": Weeks on Attorneys, secs. 250, 267, and cases there cited; Mechem on Agency, sec. 856; *In re Herman*, 50 Fed. 517; *Ronald v. Association*, 30 Fed. 228; *Butchers' Union Slaughter-house etc. Co. v. Crescent City Livestock etc. Co.*, 41 La. Ann. 355, 6 South. 309; *Gardiner v. Tyler*, 36 How. Pr. 63. The substitution, however, of attorneys, is a matter largely in the discretion of the court, and we do not say that there may not be a case in which attorneys may be discharged without paying or securing fees already earned. We do say that the rule of law is that fees <sup>438</sup> or commissions already earned must be paid or secured before substitution can be had. If this is impossible in any given case, this fact must be shown by the party moving the discharge and substitution, and then it should appear that justice to the client or attorney demands the change. We do not say that there does not exist in this case such a state of facts as renders a change necessary and proper, and therefore do not

condemn the judgment of the court below; but this change should not be made without first paying or securing the fees earned, unless, as is stated, the court below should deem this impossible or impracticable. For these reasons the judgment of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Huston and Sullivan, JJ., concur.

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*An Attorney at Law* is an officer of court: See the monographic note to *Burns v. Allen*, 2 Am. St. Rep. 847. Once admitted to represent a party, it is held that he cannot be discharged without the consent of the court, until the suit is ended: *Walton v. Sugg*, Phill. (N. C.) 98, 93 Am. Dec. 580. As to the respective rights and powers of attorney and client to manage the action, see the monographic notes to *Board of Commissioners v. Younger*, 87 Am. Dec. 166-170; *Cameron v. Boeger*, 93 Am. St. Rep. 169-179. An attorney has a lien on all papers and documents coming into his hands professionally: See the monographic note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 251, on liens of attorneys.

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## STATE v. McDONALD.

[4 Idaho, 468, 40 Pac. 312.]

**OFFICIAL BONDS—Failure of Officer to Sign.**—The omission of an officer to sign his official bond does not release him or his sureties from any liability arising under the terms or conditions of his bond. Such bond is joint and several. (p. 139.)

**OFFICIAL BONDS—Estoppel Against Surety.**—A surety on an official bond is estopped from denying any fact recited therein, when, by such denial, he seeks to avoid liability in an action between the parties to the bond. (p. 139.)

**OFFICIAL BONDS—Performance of Duties Secured.**—An official bond conditioned on the faithful discharge of all duties required of the sheriff by law covers the discharge of his duties as license or tax collector, when, by law, it is his duty to collect and pay over county and state licenses. (p. 139.)

**OFFICIAL BONDS—Action on Pleading.**—In an action to recover on an official bond, it is not necessary to state in the complaint the several items of defalcation separately. (p. 139.)

**OFFICIAL BONDS—Liability of Surety.**—If an official bond is joint and several, action may be maintained against all of the sureties jointly or against each severally. (pp. 139, 140.)

**OFFICIAL BONDS.—Failure of a Surety on an Official Bond to Justify** does not release him from liability, if the bond is accepted without requiring him to justify. (p. 140.)

G. M. Parsons, attorney general, for the state.

Hagan & Beale and W. W. Woods, for the respondent.

**470 SULLIVAN, J.** This is an action to recover on an official bond. One Richard A. Cunningham was elected sheriff



of Shoshone county on the first day of October, 1890, and on November 26, 1890, filed his official bond. Thereafter a question was raised as to the validity of his acts as sheriff, on the ground that he had failed to qualify as sheriff within thirty days after his election. To avoid any complications that might in the future arise by reason of that fact, Cunningham was appointed sheriff of said county by the governor of the state, and on the suggestion of the board of county commissioners he filed another bond, on the 18th of March, 1891. Said bond was duly approved by said board. Subsequent to the filing of said bond, the said sheriff collected and received for licenses seven thousand three hundred and three dollars and five cents, and also collected for the use and benefit of said county fees in civil cases amounting to seven hundred and fifty-four dollars and seventy-five cents. No part of either of said sums has he ever paid to said county or to the state of Idaho. The complaint alleges the entry of said Cunningham into said sheriff's office, his giving the bond sued on, his collection of public moneys, and his failure to pay the same over as required <sup>471</sup> by law or at all; and prays for judgment against the bondsmen for the sums so collected, with interest and costs. To the complaint several demurrers were interposed, one of which was joined in by several of the defendants, and others by separate defendants. The court sustained the several demurrers. Thereupon the plaintiff refused to amend, and judgment was entered dismissing the action, and for costs against the state. This appeal is from the judgment.

The first point made by the demurrers is that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges the election and appointment of the said Cunningham to said office, and his entry upon the duties of said office; also that he gave an official bond conditional upon the faithful performance and discharge of all duties required of him by law as such sheriff, with the defendants as sureties thereon; that as part of such duties he collected certain license taxes and fees, which belonged to the county and state, and failed and refused to pay the same over as by law required. The complaint states a cause of action, without ambiguity or uncertainty.

It is contended by respondents that section 396 of the Revised Statutes provides that the bond must be signed by the principal and at least two sureties, and, as the bond sued on

was not signed by the principal, it is void for that reason. The bond recites the fact that said Cunningham, as principal, and the defendants, as sureties, are jointly bound unto the state of Idaho, etc. The omission of the principal to sign the bond did not release him from any liability arising under the terms of the bond, nor would such omission release the sureties. The failure of Cunningham to sign as principal does not invalidate the bond: *People v. Slocum*, 1 Idaho, 62; *Kurtz v. Froquer*, 94 Cal. 91, 29 Pac. 413. A fact which must be borne in mind is that the bond is joint and several.

The bond sued on recites that Cunningham was elected, when it is contended it was given in pursuance of the appointment of the governor. The misrecital in that regard (if it is a misrecital) is not sufficient to avoid the bond and release the sureties. The clear intention of the sureties was to give a bond <sup>472</sup> for the faithful performance of all duties required of Cunningham as sheriff, and they cannot escape liability by such a trivial technicality as that mentioned. And further, the plain rule of law is that the surety is estopped from denying any fact recited in the bond, when, by such denial, he seeks to avoid liability in an action between the parties to the bond: *Murfree on Official Bonds*, sec. 133, and authorities there cited, also, sec. 9; *Bigelow on Estoppel*, 4th ed., p. 355, note 5, p. 361, notes 3, 4; *People v. Love*, 25 Cal. 251.

The next contention is that the bond was given on Cunningham's behalf as sheriff, and not as license or tax collector. The law makes it the duty of the sheriff to collect and pay over county and state licenses: *Rev. Stats.*, sec. 2157. The bond is conditioned on the faithful performance and discharge of all duties required of the sheriff by law. There is nothing in this contention: *Murfree on Official Bonds*, sec. 193.

The complaint clearly indicates that this action is upon the bond filed March 18, 1891. There is nothing in the point made by the demurrer as to misjoinder of causes of action. The several items of defalcation need not be separately averred: 1 *Estee's Pleading and Practice*, sec. 560.

The fourth cause of demurrer is that there is a misjoinder of parties defendant. It is claimed that the defendants did not each obligate themselves in the same sum, and that the defendants Monk and Desaulnier did not bind themselves in any sum. To this contention it is sufficient to say the bond is joint and several, and therefore the action may be maintained against all

jointly or against each severally: *People v. Stacy*, 74 Cal. 373, 16 Pac. 192. The fact that a surety fails to justify does not release him from liability, if the bond is accepted without requiring him to justify: *Taylor Co. v. King*, 73 Iowa, 153, 5 Am. St. Rep. 666, 34 N. W. 774. The judgment of the court below is reversed, with instructions to overrule the demurrers, and to proceed with the case. Costs against the respondents.

Morgan, C. J., and Huston, J., concur.

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*An Official Bond*, if not signed by the principal, is not, under ordinary circumstances, binding on the sureties. There is authority, however, to the contrary. But the fact that a surety does not justify does not relieve him from liability, if the bond has been accepted without such justification: See the monographic note to *Estate of Ramsey v. People*, 90 Am. St. Rep. 191-194.

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## DUNLAP v. PATTISON.

[4 Idaho, 473, 42 Pac. 504.]

**MINES AND MINING—Location of Claim by Agent.**—The location of a mining claim for his principal may be made by an agent or attorney in fact, and every act necessary thereto, including the affidavit of location, may be made and performed by such agent or attorney, if the facts required are within his knowledge. (p. 144.)

W. W. Woods, for the appellant.

C. W. Beale, for the respondents.

**474** MORGAN, C. J. Appellant claimed to own a consolidated placer mining claim in Eagle mining district, Shoshone county, Idaho, called the Noonday, Midnight, No. 9, and No. 10 placers, and made application for patent; and thereupon the respondents, claiming to own the Roanoke and Break of Day placers, conflicting almost entirely with No. 9 and No. 10 placers, filed their protest and adverse claim in the land office in Coeur d'Alene City, Idaho, and within the statutory time brought this action, which is an adverse suit. The appellant answered the complaint, and denied the validity of the location of the Roanoke placer claim and the Break of Day, and alleged the location and ownership of placer claims Nos. 9 and 10, and title in himself. To prove title in the appellant, he introduced a power of attorney from John R. Waite, making and constituting the said defendant, Moses Pattison, his true and lawful attorney for himself (Waite), and in his name,

place, and stead, to and for the purpose of locating in his name certain ground on Eagle creek, Shoshone county, Idaho, for placer mining purposes, giving and granting unto him (the said attorney) power and authority to do and perform all and every act and thing whatsoever required and necessary to be done in and about the premises, as fully to all intents and purposes as the said Waite might or could do if personally present. Thereupon the appellant offered in evidence a location notice, which was identified as the location notice of claim No. 9, which said notice was excluded by the court, for the reason that the claim was located in the name of John K. Waite by Moses <sup>475</sup> Pattison, his attorney in fact, and was sworn to by Moses Pattison, instead of John K. Waite, the locator named in the notice; the court holding that nobody but one of the locators could make the affidavit; that, in the case before the court, John K. Waite was the locator, and the only locator. The location notice of placer mining claim No. 10 was then offered in evidence, and was the same in all respects as that of No. 9, except that the location was made in the name of Alexander Pearson, by Moses Pattison, as attorney in fact, the name of Pearson only appearing in the notice as the locator, and was sworn to, as No. 9, by Moses Pattison. This location notice was excluded also, for the same reason as that given for the exclusion of No. 9. Both these rulings were excepted to by the defendant, and the case is brought to this court on appeal, the only error contended for being the ruling of the court, as above stated, in excluding this notice.

Section 3104 of the Revised Statutes of Idaho provides that "at the time of presenting a notice of location for record, or within five days thereafter, one of the locators named in the same must make and subscribe an affidavit in writing on or attached to the notice, in the following form, to wit: 'I, —— do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith, called the —— ledge; that the same has not to the best of my knowledge and belief been before located according to the laws of the United States and this territory, or, if so located, that the same has been abandoned or forfeited,' " etc.

It is contended on the part of appellant that the construction by the court of the literal language of the statute, requiring one of the locators named in the notice to make the foregoing affidavit, is too narrow. In the case of *Schultz v.*



Keeler, 2 Idaho, 333, 13 Pac. 481, this court held that a valid location of a mining claim could be made through an agent; and in *Gore v. McBrayer*, 18 Cal. 587, the court holds that "it is not necessary that a party should act personally in taking up a claim, or in doing the acts required to give evidence of the appropriation, or to perfect appropriation; and that such acts are valid if done by anyone for him or with his assent or approval, <sup>476</sup> and assent will be presumed." In the above case the notice contained the name of the locator, as well as those for whom location was made. In *Morton v. Solano etc. Min. Co.*, 26 Cal. 530, the court holds that a person may locate a mining claim in the name of himself and others named in the notice of location, and, when so located, title will be good in the others not present and having no notice of the location. One of several colocators of a mining claim may cause a notice of a mining claim to be recorded in the name of himself and others not present, and the location will be good: *Kramer v. Settle*, 1 Idaho, 485. It will also be seen that section 3101 of the Revised Statutes provides that the locator of any lode mining claim must, at the time of making the location, place a substantial stake or post, not less than four inches square, etc.; and yet this and every other act necessary to be done by the locator to make a valid location may be done by an agent, although the statute distinctly states that the locator must do these things. Further, the statute provides that the recorder must record the claims, and yet the recorder may do this by his deputy or agent, or by a mere clerk in the office, although the clerk may have neither power of attorney to act, nor even written authority of any kind, nor is it necessary that he be a sworn officer, and his acts are as valid as if performed by the recorder himself. The courts have repeatedly held that claims may be located by an agent, as well as by the principal. There would seem to be no reason why this affidavit might not be as well made by the agent as by the principal; in fact better, as, in case the claim was located by an agent, he would be the person acquainted with the facts necessary to be stated in the affidavit—as "that he was acquainted with the mining ground described that it had not been theretofore located, or that it had been abandoned." If the person named in the notice must, of necessity, make the affidavit, then such person must, before completing the location, go upon the ground in person to acquaint himself with the facts necessary to be stated in the affidavit. It

is, and was when this law was passed, a well-known custom of the country to employ prospectors to go into the mountainous <sup>477</sup> country and search for mines. These men ordinarily had no money, and money, provisions, horses, tools, and supplies of every kind were furnished by men who had the means to do so, but could not themselves go; but, if they must go to make this affidavit, then they might as well do the work. It will be seen that the narrow construction of this statute contended for would at once destroy the whole business of outfitting men to prospect for mines, by which means probably three-fourths of all the mines in the country were discovered. It cannot be that the legislature intended this. If the prospector inserts his own name in the notice of location as one of the locators, wherein does that change his relation to the others named in the notice? He must make the affidavit for them, as well as himself. If he can do this, why can he not make it wholly for them? The main thing required by the legislature (section 3104) is an affidavit that the party making it is acquainted with the mining ground, that it has not been located, or, if located, has been abandoned. These are the important facts. Who makes the affidavit is not important, so he is acquainted with the facts.

We must be careful that we do not overlook the spirit—the reason—of the law in a mentally blind effort to follow the words. Such statutes, being directory only, in unimportant particulars should be liberally construed. Such construction is not without authority in similar cases. A statute which requires something to be done by a person would be complied with, in general, if done by another for him, for it is a general principle of law that “qui facit per alium facit per se”: Endlich on Interpretation of Statutes, sec. 105. On this ground it is held that, where the statute required an oath to be administered by the court or judge, it was complied with if the oath was administered by the clerk of the court: *Oaks v. Rodgers*, 48 Cal. 197. So an Irish statute which gave a tenant for life or for more than fourteen years the right to fell trees planted by him, and required the tenant so planting to file an affidavit that they were planted by him, the form of which, in the act, purported to be made by the tenant personally, was held to be satisfied by the affidavit of the tenant's agent. <sup>478</sup> A different construction, it was said, would have rendered the act inapplicable to most of the cases which it had in view: *Earl of Mountcashell v. O'Neill*, L. R. 5 H. L. 937.

We think the construction given to the statute by the court below was never intended by the legislature, and that, as the location may be made as well by the agent or attorney in fact of the locator, so every act necessary thereto may also be performed by such agent or attorney, if the facts required are within his knowledge. Of course, the agency must be shown by sufficient evidence. Judgment and decree reversed. Costs awarded to appellant.

Huston and Sullivan, JJ., concur.

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*Mining Claim.*—A person may prospect and locate mining claims as a partner, or for the joint benefit of himself and others, and the agreement therefor is not within the statute of frauds: *Raymond v. Johnson*, 17 Wash. 232, 61 Am. St. Rep. 908, 49 Pac. 492; *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803.

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## STEEL v. ARGENTINE MINING COMPANY.

[4 Idaho, 505, 42 Pac. 585.]

**MECHANICS' LIENS**—**Contract to Purchase—Failure of Contract.**—A mechanic's lien in favor of a person furnishing materials or performing labor for one in possession under an option or contract to purchase, to whom alone credit is given, cannot be enforced against the owner of the property after such person in possession has failed to fulfill his contract or to purchase the property. (p. 148.)

**MECHANICS' LIENS**—**Sufficiency of Notice.**—A statement in the notice of a mechanic's lien that the property upon which the labor was performed or materials furnished, "was the property of the defendant," is wholly insufficient as an allegation of ownership. (p. 150.)

C. W. Beale, for the appellant.

W. W. Woods and Richardson & Williams, for the respondent.

**507** **HUSTON, J.** On the eleventh day of November, 1891, the appellant corporation was the owner of certain mining property situated in Shoshone county, Idaho, and on that day made and entered into the following contract, in writing, with one John H. Davey and Frank J. Davey (Exhibit "A"):

"This agreement, made and entered into this eleventh day of November, 1891, by and between the Argentine Mining Company, a corporation, duly organized and existing under the laws of the state of Oregon, party of the first part, and John H. Davey and Frank J. Davey, of Wardner, Idaho, parties of the second part, witnesseth: That the party of the first part, in consideration of the sum of one dollar to it in hand paid, the

receipt whereof is hereby acknowledged, does hereby covenant and agree that the parties of the second part may enter into and upon that certain mining claim known as and called the 'Argentine Lode,' situated on Bonanza gulch, a tributary of the south fork of the Coeur d'Alene river, in Evolution mining district, county of Shoshone, and state of Idaho, and to mine and extract therefrom, and ship and sell, the ores therein contained, for and during the term of eight months from and after the date of this agreement, which date shall be deemed the time when said parties of the second part shall take possession thereof. And the parties of the first part do further agree that if the said parties of the second part shall, within four months of the time of taking possession of said mine, pay and deposit in the Exchange National Bank of Spokane, state of Washington, to the credit of the party of the first part, the sum of thirteen thousand dollars (\$13,000), and shall also, within eight months of the time of taking possession of said mine, pay and deposit in said bank, to <sup>508</sup> the credit of the party of the first part, the further sum of thirteen thousand dollars, and shall pay into said bank the further sum of ten thousand dollars (\$10,000), whenever the party of the first part shall deposit in said bank a receiver's receipt showing that the party of the first part has entered said mining claim at the United States land office at Coeur d'Alene, Idaho, then, upon said payments being made, the party of the first part will make, execute, and deliver to the parties of the second part a good and sufficient deed conveying to the parties of the second part the said mining claim. It is further agreed by and between the parties hereto that the net profits of the working of said mine, and the sale of ores, by the second parties, shall be deposited in the said Exchange National Bank of Spokane, state of Washington, where a triplicate of this agreement is deposited, and that such net proceeds so deposited, shall apply upon and be deemed a payment to the amount thereof upon this agreement, and to be applied to the first payments becoming due thereon; it being understood and agreed between the parties hereto, however, that, in arriving at said net profits, only the actual cost of mining, shipping and treatment of the ores shall be deducted from the gross value thereof, and that the balance of the proceeds shall be deemed the net profits; in other words, it being the intent and meaning of this clause that any work commonly called 'dead work' by miners shall not be deducted



from the proceeds of the ores in arriving at the net profits. It is further agreed and understood between the parties hereto that if, at the expiration of said eight months, the said parties of the second part shall have made the said two thirteen thousand dollar payments, and the said receiver's receipt for the entry of said mine shall not then have been obtained by the first party, and deposited in said bank, that then, and in that case, the parties of the second part shall be entitled to go on and work said mine in the same manner as before, depositing the net proceeds of such working in said bank until a sufficient sum is there deposited to pay said ten thousand dollars (\$10,000); and that thereafter the parties of the second part shall be entitled to go on and work said mine in such manner as they shall see fit, and to have to their own use all the proceeds of the ores, as fully and to all intents and purposes as though they had a <sup>509</sup> deed therefor; but the said party of the first part shall not be entitled to draw said sum of ten thousand dollars (\$10,000) from said bank until it shall have procured and deposited therein the said final receiver's receipt for the entry of said mine. The parties of the second part further agree that, in working said mine, they will do so in an economical and miner-like manner, and that all tunnels, drifts, shafts and stopes therein shall be promptly timbered wherever necessary to preserve the work therein. It is further agreed between the parties hereto that, if the parties of the second part shall fail to make any of said payments within the time herein mentioned, then this agreement shall, at the option of the party of the first part be forfeited, and all payments previously made shall also be forfeited to the party of the first part; and the parties of the second part agree that, upon such forfeiture, they will quit and deliver up to the party of the first part the possession of said mine. In witness whereof, the party of the first part has caused its corporate name to be hereunto subscribed by its president, and its seal to be hereunto affixed by its secretary, and the parties of the second part have hereunto subscribed their names, the day and year first above written. In triplicate.

“THE ARGENTINE MINING COMPANY.

“By A. J. KNOTT, Pres. [Seal]

“JOHN H. DAVEY. [Seal]

“FRANK J. DAVEY. [Seal]

“Attest: W. S. STEVENS, [Seal]

“Secretary.”

Under this contract or agreement, said Daveys entered into possession of said mining property in November, 1891, and continued in possession thereof, mining, working and extracting ore therefrom, and disposing of the same, until the latter part of May, 1892, having taken therefrom during that period some sixty thousand dollars worth of ore. In the latter part of May, 1892, said Daveys having entirely failed to keep their said contract, and not having made any, or any part, of the stipulated payments, said Daveys surrendered to appellant the possession of said mining property and premises. During and while the said Daveys were so in possession of and working said mine, <sup>510</sup> they incurred certain indebtedness, for work and labor done and performed in and upon said mine, and for materials furnished to be used therein and in the working thereof, to secure which certain liens were filed by the parties to whom such indebtedness was due, upon said mine, to foreclose which liens action was brought in the district court for Shoshone county, and judgment recovered therein for the various amounts thereof. This appeal is from such judgment.

Section 5125 of the Revised Statutes of Idaho is as follows: "Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct, to create hydraulic power or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, but the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay." It is claimed by appellant that none of the liens sought to be enforced in this action are valid or within the provisions of said section, in that none of the work or labor, nor any of the materials furnished, were so done or furnished for or at the request of the owner of said mine or its agent.

Let us examine these claims or liens in the order in which they are presented in the complaint. The notice of lien filed by the first-named plaintiff, the Parke & Lacy Machinery Company (appearing herein by Thomas Steel, receiver), contains the following words: "That the material so furnished the said mine was under a contract with the same company, made by

John H. Davey and Frank Davey, the managers of the said Argentine Mining Company," etc. In support of this statement in their notice of lien, respondents rely upon the said contract or agreement of purchase above set forth, between the said Daveys and appellant, claiming that, by the terms of said contract, the Daveys became and were the agents of appellant. We cannot agree with this contention. While it is true that no question of a lien arose in the case of *Settle v. Winters*, 2 511 Idaho, 215, 10 Pac. 216, the court did, in that case, define a similar contract to be a lease with option to purchase, and under a statute identical with our section 5128 of the Revised Statutes, which is as follows: "Sec. 5128. The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, is also subject to the lien, if, at the time of the commencement of the work or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

The supreme court of Montana held in *Block v. Murray*, 12 Mont. 545, 31 Pac. 550, that a lien would not obtain in favor of persons furnishing materials or performing labor for one in possession under such a contract. It can hardly be contended, in the face of the record in this case, that any of the claimants were unadvised as to whom they were giving credit, or to whom they were to look for payment. It does not appear, either from the testimony of John H. Davey, the senior partner in the firm of John H. Davey & Son, or from that of Mr. Hendrie, the manager of the Parke & Lacy Machinery Company, of whom the materials alleged to have been furnished were purchased, that there was any question as to whom the credit was given therefor. Davey testifies that he told Hendrie at the time of making the purchase: "We have all that property [referring to the mining property of the Argentine Mining Company], bought out that company, and we own all that property on a time purchase." The bill was rendered to John H. Davey & Son, was charged on the books of the Parke & Lacy Company to John H. Davey & Son, and subsequently a lien was filed by the Parke & Lacy Company against John H. Davey & Son for this identical claim. It is in evidence in the record that,

after the machinery and other materials were furnished by the Parke & Lacy Company, they sent to Daveys a lease, by the terms of which the title to the property was to remain in said Parke & Lacy Company until paid for. Can it be seriously contended, under such a state of facts, that the Parke & Lacy Company <sup>512</sup> supposed they were dealing with the Argentine Mining Company, or with John H. Davey as its agent?

Respondent cites the case of Eaman v. Bashford (Ariz.), 37 Pac. 24, an Arizona case; but on examination of that case will show that the lien law of that territory contains the following provision, not to be found in the statute of Idaho, to wit: "That the word 'agent' shall be construed to include all contractors, subcontractors, builders or persons, having charge or control of a mine," etc. This case can scarcely be recognized as supporting the contention of respondents in the case under consideration. It seems to us there is a very marked difference between the contract in the Arizona case and this case. By the terms of the contract in that case, the vendor was to have control of the product of the mine. The bullion was to be shipped in his name, and returns made to him; and he was required to apply such proceeds to the payment of costs of the work, in advance of all other claims. He was thus fully protected against the encumbering of his property by the vendee. Counsel contend that, "whatever may be said of the testimony of J. H. Davey, it is perfectly clear that he assumed to act as the manager of the Argentine Mining Company." But we must not overlook the fact that Mr. J. H. Davey, in his testimony, reiterates the statement that the firm of J. H. Davey & Son were the Argentine Mining Company; that they had bought out that company, and elected to continue operations in the name of the old company. At folio 471 of the transcript, he says: "I can tell you, as before, we were the company ourselves. I was the manager. We considered that we were the owners of the company." It is apparent from the record that J. H. Davey & Son were, during the whole period covered by the incurring of all the indebtedness included in these liens, not only representing themselves as the "Argentine Mining Company," the successors of the defendant corporation, but that they were so recognized and accepted by the creditors herein, and the defendant was not so known or recognized. Whatever the purpose of the Daveys may have been in making such representations, one thing



is not only apparent, but conclusive, from the record, and that is that their representations were taken and accepted by the plaintiffs, as the basis of their credits; and, while we are in accord with the rule that <sup>513</sup> the lien law should be liberally construed to the protection of the rights of lienholders, we are not prepared to go to the extent of saying that the laborer or materialman may credit one person, and then recover from another, when the relation of principal and agent is not shown to have existed.

We do not think the record anywhere shows any authority on the part of Knott, the president, or Hetzel, the attorney of the company, to bind the Argentine company to the payment of any claims against the company. The only allegation of ownership which appears in any of the notices of lien in the record is the statement that the work and labor for which the lien was filed "was performed upon the lode mining claim, the property of the Argentine Mining Company," or that the materials furnished "were used upon the Argentine lode mining claim, the property of the Argentine Mining Company." Under the decision of this court in the case of *White v. Mullens*, 3 Idaho, 434, 31 Pac. 801, we do not think the notices of lien in this case sufficient. A statement in the notice of lien that the mines upon which labor was performed or materials were furnished "was the property of the defendant" is not such an allegation of ownership as is required by statute.

It seems to us, from a careful and thorough examination of the evidence in this case, that, at the time credit was given by each and all of the lienholders, it was so given to John H. Davey & Son, and not to the defendant corporation. The judgment of the district court is reversed, with costs.

Morgan, C. J., and Sullivan, J., concur.

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*A Mechanic's Lien* will attach to the equitable interest in land held under a contract of purchase, and if such interest is afterward enlarged into a fee, the lien may be asserted against the whole title: *Fullmer v. Poust*, 155 Pa. St. 275, 35 Am. St. Rep. 881, 26 Atl. 543. See *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275. However, a mechanic's lien binds only such title as the person making the contract has: *Taylor v. Murphy*, 148 Pa. St. 337, 33 Am. St. Rep. 825, 23 Atl. 1134; *Henderson v. Connelly*, 123 Ill. 98, 5 Am. St. Rep. 490, 14 N. E. 1. A lien attaching to a leasehold estate is subject to all conditions of the lease, and may be defeated by a forfeiture under the express conditions thereof: *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486, 34 N. E. 476. And the same would seem to be true as to a lien attaching to the interest of a vendee under a contract of sale: See the note to *Loonie v. Hogan*, 61 Am. Dec. 689.

BLUMAU-FRANK DRUG CO. v. BRANSTETTER.

[4 Idaho, 557, 43 Pac. 575.]

**CHATTEL MORTGAGES—Foreclosure—Process.**—The affidavit and notice for the foreclosure of a chattel mortgage required by statute is process, and protects the sheriff in the execution thereof, the same as he is protected under the service of execution upon a judgment. (p. 151.)

**CHATTEL MORTGAGES—Foreclosure—Duties and Liabilities of Officer.**—Upon receipt of an affidavit and notice for the foreclosure of a chattel mortgage, the sheriff must proceed to execute such process by levying upon the property described therein, and after such levy and taking the property into his possession, he must give notice and sell it as directed by statute, although an attachment or execution of a judgment creditor is placed in his hands after such levy. He is not called upon to determine the validity of such chattel mortgage and such affidavit and notice, fair upon their face, is process sufficient to protect him under his levy. (p. 155.)

J. R. Wester and G. H. Stewart, for the appellant.

S. H. Hays and H. Z. Johnson, for the respondent.

**560 MORGAN, C. J.** On the fifth day of March, 1893, W. H. Ridenbaugh sold to T. D. Farrer and M. J. Rounseville, of the firm of T. D. Farrer & Co., a stock of drugs and fixtures then being and situated in the store building of the said Ridenbaugh, in Boise City, Idaho, for the sum of five thousand dollars, and delivered same to said firm. In payment for said stock, said Ridenbaugh took the note of said firm for said sum, and, to secure the same, took a chattel mortgage on said stock of drugs and fixtures in said store. Thereafter, on the seventh day of August, 1893, said T. D. Farrer & Co., having in the meantime paid the said W. H. Ridenbaugh the sum of two thousand dollars, gave to said Ridenbaugh a new note for the sum of three thousand three hundred and thirty-two dollars and twenty-eight cents, and, to secure the same, gave to said Ridenbaugh a new mortgage on said stock, described as follows, to wit: "All drugs, medicines, bottles, cases, flasks, patent medicines, chemicals, wines, liquors, cigars, tobaccos, paints, oils, brushes, glass, varnishes, soaps, toilet articles, toilet soaps, perfumes, trusses, suspensories, sponges, syringes, catheters, rubber tubing, combs, cutlery, compasses, spectacles and all drug sundries, soda fountain, water glasses, fixtures and apparatus, oil, file of prescriptions, and all medicinal pharmaceutical books,

medical and unabridged dictionaries, price lists, and catalogues, fixtures, show cases, prescription cases, counters, shelving, stoves, writing desks, safe, scale, stepladder, hose, signs, electric light fixtures, tools, sponges, sacks, all ornamental fixtures, chairs, printed matter, paper sacks, motors, graduates, and medicine and merchandise; and, in fact, every thing and article owned and used in and about said store, room and place above described." A portion of the drugs and other goods, except fixtures, had been sold before foreclosure proceedings, and the money used to purchase other goods in the ordinary course of <sup>561</sup> trade. On November 15, 1893, the mortgagee, Ridenbaugh, gave the defendant, as sheriff of Ada county, an affidavit and notice of foreclosure of said mortgage, and for the sale of said stock, under sections 3390-3392 of the Revised Statutes of Idaho. On the 29th of November, 1893, the sheriff served this process, levied upon the goods and fixtures, and took them into possession, and thereafter sold them under the mortgage. December 1, 1893, the respondent commenced an action against the said Farrer and Rounseville to recover five hundred and forty-two dollars for goods sold to them between March 9, 1893, and August 1, 1893, and on said December 1st delivered an attachment in said action to said appellant, the sheriff, and orally requested the sheriff to disregard the mortgage, and take the property by virtue of the attachment. No indemnity bond was offered, and the sheriff had the goods in his possession under the foreclosure proceedings when he received the attachment. The sheriff levied the attachment subject to the chattel mortgage. The respondent recovered judgment against T. D. Farrer & Co., February 21, 1894. On the fifth day of December, 1893, the appellant sold said property at public sale, after due notice, to W. H. Ridenbaugh, the mortgagee, for two thousand five hundred dollars, and delivered the same to him, and thereafter returned said writ of attachment nulla bona. Thereupon the respondent commenced this action against said appellant, March 14, 1894. The action was tried by the court without a jury, and judgment rendered against the appellant, March 30, 1894, for said sum of five hundred and forty-two dollars, from which judgment the defendant appeals to this court.

In the case at bar, both parties concede that process good upon its face protects the sheriff even though founded on a void or irregular judgment: See Idaho Rev. Stats., sec. 1882

(which is simply an enactment of a principle of the common law); *Dusy v. Helm*, 59 Cal. 188; *Norcross v. Nunan*, 61 Cal. 640; and many other authorities that may be cited. Respondent contends, however, that affidavit and notice under sections 3390 and 3391 are not process, and that "process and orders," as defined by section 1870, is the only kind of process known to our statute, and the only kind that will protect the officer, if fair upon its face. This definition includes, of course, attachments and executions by virtue of which goods may be levied <sup>562</sup> upon and sold to pay debts. Section 1870 is as follows: "Process as used in this article includes all writs, warrants, summons and orders of courts of justice or judicial officers." It will be seen that this section does not pretend to name all writings that may properly be denominated "process." It only says the word "process" includes certain papers. It may, notwithstanding section 1870, include many other papers not therein named. It is not claimed that the method pointed out in sections 3390 and 3391, and others thereto connected, is not a legal and constitutional method of foreclosing chattel mortgages. By virtue of this affidavit and notice, everything can be done, within its specified limits, that can be done under and by virtue of an execution. Section 3391 requires that the affidavit, together with a notice signed by the mortgagee, his agent or attorney, shall be delivered to the sheriff, requiring such officer to take the mortgaged property into his possession and sell the same. Section 3392 gives the officer directions how to proceed to serve the affidavit, and give the proper notice, etc. Section 3393 is as follows: "The officer [sheriff] must take the property into his possession and give notice of sale in the same manner and for the same length of time as is required in the cases of the sale of like property on execution and the sale must be conducted in the same manner." Section 3394 states that the purchaser at such sale takes all the interest of the mortgagor in the property at the time of the execution of the mortgage, and the officer must execute to him a bill of sale of the property. Section 3395 requires the sheriff to make return on the affidavit of all his proceedings thereunder, and transmit the same to the clerk of the district court. It is apparent that the affidavit and notice are as effectual, in the sale of property mortgaged, and in the collection of the debt, in every respect, as an execution. The levy, taking possession, and sale must be made in the same manner; and the absolute and legal



transfer from one person to another, and the collection of the money result. Where these papers are placed in the hands of the sheriff, and they are fair upon their face, he must proceed to execute them in the manner pointed out in the statute. The law requires it, and the sheriff has no alternative. It is, in fact and in law, a writ of execution in this proceeding, and for a neglect or refusal to execute which <sup>563</sup> he would be liable to the creditors, as pointed out in section 1875 of the Revised Statutes of Idaho. And the converse is true. It is process, in the execution of which the sheriff is protected. In this case the sheriff had levied upon and taken the property into his possession, by virtue of the affidavit and notice, before the attachment was placed in his hands. Having put his hand to the plow, he cannot hesitate, or turn back, upon the verbal instruction or request of the attaching creditor. In this respect the case at bar differs from the case of *Lewiston Nat. Bank v. Martin*. In the case of *Lewiston Nat. Bank v. Martin*, 2 Idaho, 734, 23 Pac. 920, the stock of drugs was mortgaged in substantially the same manner as in the case at bar, the goods were sold in ordinary course of trade, and money used to purchase new goods, and this was permitted by the provisions of the mortgage, under the provision that the goods should remain in the possession of the mortgagor; and gave him the free and full use and enjoyment of the same. Before any attempt was made to foreclose the above mortgage, by affidavit and notice, or otherwise, Porter & Co. obtained judgment against the mortgagor, levied execution on said goods, and sold them on August 20, 1888. Thereafter, on the eleventh day of September, the bank obtained judgment against the mortgagor, and an order of sale of the mortgaged property under the supposed lien. Execution was issued, and the sheriff refused to levy upon and sell said goods under the latter execution, because of prior levy and sale. The bank sued the sheriff for value of goods, and in this suit the court held the mortgage void, on authority of *Robinson v. Elliott*, 22 Wall. 524. The facts in *McConnell v. Langdon*, 3 Idaho, 157, 28 Pac. 403, were the same. The attachment was levied before foreclosure proceedings were commenced and in each case the goods were levied upon, and in the first case sold, before foreclosure proceedings were commenced. The respondent claims that the mortgage in the case at bar is almost a copy of the mortgage mentioned in *Lewiston Nat. Bank v. Martin*, 2 Idaho, 734, 23 Pac. 920. Without in any manner intimating what the opinion of this court may be when such mortgage is

fully presented for consideration, we answer: Yes; so it seems to this court; and if, as in that case, the respondent had levied his attachment upon these goods before any proceedings had been instituted for the foreclosure of <sup>564</sup> the mortgage, then the cases would seem to be almost precisely alike, and the validity of the mortgage would then have been before the court. And the same is true of the case of *McConnell v. Langdon*, 3 Idaho, 157, 28 Pac. 402; and, if presented under the same state of facts, the decision of this court in this case might have been the same as in those cases.

We must not lose sight of the fact that process fair upon its face must be executed by the sheriff, upon its being placed in his hands. We hold the affidavit and notice to be process. No objection is made by the respondent to the form of the process. Therefore the sheriff must execute it. The sheriff cannot be called upon, when he receives an execution to sit in judgment upon the validity of the judgment. Neither can he, in this case, be called upon to sit in judgment on the validity of the mortgage. This is for the court, and not for the sheriff.

But the attaching creditor is not without abundant and easy remedy. Section 3396 is: "The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the district court by any person interested in so doing, for which purpose an injunction may issue if necessary." What, if any, remedy the respondent now has it would, of course, be improper for this court to indicate. This disposes of the questions raised by the attorneys for the respondent.

The case of *Jewett v. Sundback*, 5 S. Dak. 111, 58 N. W. 20, is cited as an authority sustaining the respondent's contention. That case is similar in many respects to the case at bar, and, if the same questions had been raised before that court as are raised here, it would have been an authority in point. In that case the sheriff had the goods in his possession under foreclosure proceedings when the execution was delivered to him for service, and he was directed to levy on the goods, as in this case, and he refused. The plaintiff in execution sued the sheriff. The sheriff, for his defense, introduced the mortgage, and the plaintiff, without objection from the defense, proceeded to show that the mortgage was void; and proof was taken, and the case decided upon that proof. The sheriff did not seek to rest his defense upon the ground that he was proceeding under a writ of foreclosure which was process fair upon its face, and which he must execute, unless commanded to desist by the court, by in-

junction <sup>565</sup> or otherwise. Therefore the question before this court was not before that court, and was neither considered nor decided therein. We have not the statute of South Dakota, and therefore cannot tell what effect the statute may have had in the decision of that case. The decision of the court below is reversed, and the judgment set aside.

Sullivan and Huston, JJ., concur.

#### ON REHEARING.

MORGAN, C. J. The principal contention of the respondent, in his brief, was that the affidavit and notice, under the statute, is not process; and therefore the opinion deals principally with this contention. The statement that "no objection is made to the form of the process" was intended to apply to the form simply, and not to the description of the property therein, which followed the description in the mortgage. The description is sufficient, as between the parties to the mortgage. The respondent in this case did not avail himself of the means pointed out by the statute to contest the validity or sufficiency of the description, either in the mortgage or affidavit; and therefore, having taken no legal means to contest the same, such sufficiency was not before the court. And the court does not hold that such description is sufficient. The respondent repeats his argument as to insufficiency of description, and again quotes *McConnell v. Langdon*, 3 Idaho, 157, 28 Pac. 403. The court explained its position with respect to this, fully, in the original opinion, and does not think it necessary to repeat what was then said. *Howard v. Clark*, 43 Mo. 344, cited by respondent, states that the statute of Missouri provides a mode of settling all questions of priority between attaching creditors, and where the officer neglects these provisions, and decides the questions himself, he does so at his own peril. The case is not in point, as the sheriff in that case levied both attachments upon the same property on the same day, and thereby put himself in the position where he must decide as to priority. That is not this case. The priority in this case was with the mortgagee, as his levy was made first. He was as much a creditor as the attaching creditor, <sup>566</sup> and the sheriff was not obliged to resort to section 4110—commence suit, advance costs and employ counsel to determine a matter in which he had no interest. In this case the respondent was the party who wished to secure and enforce his lien upon a portion of the goods in this store, upon which it was

claimed the mortgage was not a lien. It was for the respondent to make such claim good, by such legal means as the statute provided. The respondent had the means at his disposal to compel a decision as to the validity of the mortgage, and also to compel the mortgagee to point out the goods upon which his mortgage was a valid lien. Having neglected to employ the means so provided, he could not, by verbal request or order, compel or require the sheriff to do this for him. *Trowbridge v. Cushman*, 24 Pick. 310, and *Commercial Bank v. Mitchell*, 58 Cal. 42, are neither of them in point, as there the question was whether an execution against an individual could take priority over an execution against a firm, or two joint makers of a note, when levied upon the firm or joint property. Not so in this case. We are quite surprised at the statement in the petition for rehearing "that, by an agreement between the mortgagor and mortgagee which the law declares void, a confusion of goods had occurred." We find no agreement in the mortgage or elsewhere, on the part of the mortgagee, that new goods might be purchased with the money received on sales, and such goods mingled with the others. The reasoning, therefore, founded upon such false premises, and the authorities quoted in support thereof, must fail of reaching the case. There can be no question of the right of the plaintiff to attack the validity of the mortgage, under section 3396 of the Revised Statutes of Idaho. Rehearing is denied.

Sullivan and Huston, JJ., concur.

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*It is the Duty of an Officer to Whom Writs are committed to serve them promptly:* *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324. And a ministerial officer, acting under process fair on its face, and issuing from a tribunal with apparent jurisdiction, is justified in obeying it, against all irregularities and illegalities except his own: See *Ward v. Deadman*, 124 Ala. 288, 82 Am. St. Rep. 172, 26 South. 916; *St. Louis etc. Ry. Co. v. Lowder*, 138 Mo. 533, 60 Am. St. Rep. 565, 39 S. W. 799; *Tellefsen v. Fee*, 168 Mass. 188, 60 Am. St. Rep. 379, 46 N. E. 562. And the word "process," as here used, includes every description of writ, precept, warrant, or mandate issuing from a court, tribunal, or person possessing judicial powers, commanding an arrest or a seizure of, or levy upon property, personal or real: See the monographic note to *Savacool v. Boughton*, 21 Am. Dec. 190.

*Where Property has been Levied upon and brought within the custody of the law, it is not subject to a second levy by another officer under a different process.* But successive levies may be made thereon by the officer having it in custody, subject to prior valid levies: *Pirkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763, 87 N. W. 160. If a chattel mortgagee, under a power of sale, advertised the property for sale, but prior to the sale and subsequently to the advertisement, the property is seized under an execution held by a third person, the sale passes no title: *Fulghum v. J. P. Williams Co.*, 114 Ga. 643, 88 Am. St. Rep. 48, 40 S. E. 695.



## GUYNN v. McDANELD.

[4 Idaho, 605, 43 Pac. 74.]

**PROCESS—Service of on Attendant in Court.**—A nonresident is not exempt from service of summons upon him in a civil suit against him while in attendance upon a court within the state as plaintiff in a suit therein. (p. 160.)

Hawley & Puckett and Reeves & Terrell, for the appellant.

E. M. Allison, Jr., G. H. Stewart and Eden & Warner, for the respondent.

**607** HUSTON, J. This is an appeal from an order and judgment of the district court for Bannock county quashing service of summons. Defendant is a resident of the state of Illinois, and while attending the United States circuit court at Boise City, in this state, as plaintiff in a suit which he had brought against the plaintiff, was served with summons in this action brought against him by plaintiff. The only question before us is, Is a nonresident plaintiff exempt from service of summons in a civil suit while in attendance upon a court within this state as plaintiff? This question has frequently been before the courts of this country, both state and federal; and, while there has been pretty general uniformity in the decisions of the federal courts, those in state courts have been almost distractingly variant.

The Revised Statutes, section 4123, provides under title 4, "Of the Place of Trial of Civil Actions," inter alia, as follows: "If none of the defendants reside in the state, or, if residing in this state, the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint, and if the defendant is about to depart from the state such action may be tried in any county where either of the parties reside or service is had." Section 4143 provides that "the summons may be served by the sheriff of the county where the defendant is found," etc. These, we believe, are all the provisions of our statute pertinent to this question. The first case cited in the brief of counsel **608** for respondent is that of *Mitchell v. Circuit Judge*, 53 Mich. 541, 19 N. W. 176. This was the case of a resident of the state, who, while attending court in a county other than that of his residence, was served with process in a civil suit. The decision was based largely upon the fact that the party

was a necessary witness, although Judge Cooley, it is true, uses the following language in his decision: "Public policy, the due administration of justice and protection to parties and witnesses, alike demand it. There would be no question about it if the suit had been commenced by arrest; but the reasons for exemption are applicable, though with somewhat less force, in other cases also." Primarily, we think, the exemption extended only to cases of arrest, and was applicable only to the case of witnesses. An examination of the authorities cited by Judge Cooley in *Mitchell v. Circuit Judge*, 53 Mich. 541, 19 N. W. 176, will show that a large majority of them arose in cases of witnesses. Still, in those courts where the rule contended for by respondent has been recognized, it has very generally been extended to parties as well as to witnesses. In *Wilson v. Donaldson*, 117 Ind. 356, 10 Am. St. Rep. 48, 20 N. E. 250, in the case of a nonresident defendant sued while returning from attending a suit brought against him by the same plaintiff in the state of Indiana, the court says: "The contention of appellant's counsel is that the fact that the appellee was in Indiana, in attendance upon court as a party to an action which he had brought against him, and for the purpose of testifying as a witness, does not entitle him to avoid the summons served upon him while in this state. Our statute is broad enough to sustain this contention if we take it apart from all the other rules of the law, for it provides that in cases of non-residents an action may be commenced and summons served in any county where they may be found. But a statute is not to be isolated from the great body of the law of which it forms a part. On the contrary, it is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes." We confess that such a rule of construction seems to us something more than novel; it is startling. It is not predicated upon any rule of *pari materia*, 609 but is, it seems to us, in conflict with those elementary principles which recognize the definitive distribution of governmental power in both our state and federal systems. If courts can set aside the positive provisions of a statute upon the specious plea that it is not in accordance with the court's idea of "the eternal fitness of things," as applied to legislation, it is difficult to conceive the limit of judicial power through the medium of construction. Great as is our respect for the court from which this decision emanates, we cannot accept its con-

clusions in this matter. Neither are we able to concur in the view of Judge Cooley as expressed in *Mitchell v. Circuit Judge*, 53 Mich. 541, 19 N. W. 176, in support of the same rule, that "public policy, the due administration of justice and protection to parties and witnesses, alike demand it." Let us see. We will suppose that in a given case a creditor, resident of the state of Illinois, sues a debtor, citizen of the state of Idaho, in the courts of Idaho. The debtor, we will suppose, has a meritorious cause of action against the creditor, but it is of a character not permissible under the rules of practice to be litigated in the suit instituted by the creditor, and the debtor is presumably too poor to enter upon the assertion of his rights in a suit which would involve the expense of taking his witnesses from Idaho to Illinois, and supporting them there during what the wealthy creditor might make interminable litigation. Would not this be a palpable denial of justice? The nonresident has sued his debtor in a forum selected by himself wherein to enforce his claimed rights, but he will not submit to have the claims of his debtor adjudicated in the same forum. Why? Because, by compelling him to seek another forum, he thereby subjects him to conditions which simply amount to a defeat of his claims. If the courts of Idaho can, in the opinion of a litigant, protect his rights in one case, it would seem that they ought to be equally adequate in another. We are tardy in recognizing a rule which seems to us capable of being wrested to the infliction of such palpable injustice, more especially as our statutes admonish us thus: "Revised statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are <sup>610</sup> to be liberally construed with a view to effect their objects and promote justice": Rev. Stats., sec. 4.

While it may be conceded that perhaps, including the decisions of the federal courts, a majority of decisions are contrary to our view, still we are "sustained and soothed" by the reflection that our position has the support and concurrence of very many of the most highly esteemed courts of the country. Say the supreme court of Rhode Island in discussing the rule under consideration, in *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 740, 15 Atl. 83: "We think it would rarely happen that the attention of a nonresident plaintiff or defendant would be so distracted by the mere service of a summons from the immediate business in hand in prosecuting or defending

a pending suit that the interests of justice would suffer in consequence, or that the liability to such service would often deter them from prosecuting or defending their just claims or rights. The reasons assigned for the exemption would apply equally as well to resident as to nonresident suitors, and it has never been deemed necessary to exempt resident suitors from the service of a summons so far as we have been able to find, except in the single state of Pennsylvania. We think these reasons are fanciful, rather than substantial": See, also, *Capwell v. Sipe*, 17 R. I. 475, 33 Am. St. Rep. 890, 23 Atl. 14; *Bishop v. Vose*, 27 Conn. 1; *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96; *Baisley v. Baisley*, 113 Mo. 544, 35 Am. St. Rep. 726, 21 S. W. 29; *Mullen v. Sanborn*, 79 Md. 364, 47 Am. St. Rep. 421, 29 Atl. 522; *Page v. Randall*, 6 Cal. 32.

The order and judgment of the district court are reversed, with costs, and the cause remanded for further proceedings.

Morgan, C. J., and Sullivan, J., concur.

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*A Nonresident Suitor*, whether plaintiff or defendant, coming into the state for the sole purpose of attending the trial of his case or business connected therewith, such attendance being shown to be necessary, is, according to the better rule, privileged from the service of civil process while coming to, returning from, and attending upon court. Some authorities, however, take a contrary view: See the monographic note to *Worth v. Norton*, 76 Am. St. Rep. 536-538.

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## BUSH v. ARTESIAN HOT AND COLD WATER CO.

[4 Idaho, 618, 43 Pac. 69.]

**CONTRACT Between City and Water Company—Damages to Individual—Privity of Contract.**—Under a contract between a city and a water company by which the latter agrees to furnish the former water sufficient for fire purposes, a private citizen cannot maintain an action against such water company for injury to, or destruction of, his property caused by the failure of such company to fulfill its contract with the city. There is no privity of contract between such citizen and such water company. (p. 164.)

Hawley & Puckett, for the appellant.

R. Z. Johnson and R. H. Johnson, for the respondent.

**620 HUSTON, J.** On the first day of August, 1893, the defendant corporation was under contract with Boise City, by the terms whereof, as the same is set forth in the complaint herein, said defendant agreed for a certain stipulated consider-

Am. St. Rep., Vol. 95—11



ation to "maintain and keep in order forty hydrants, so placed in position as aforesaid, and such other hydrants as should be required by said Boise City, and to supply water at all points where such hydrants were located, sufficient for fire purposes in the vicinity thereof," etc.; that on said first day of August, 1893, the plaintiff was the owner and in possession of certain real property and buildings therein situated in said Boise City; that said buildings were destroyed by fire on said first day of August, whereby plaintiff suffered damage in the sum of twelve thousand one hundred dollars; that such loss was the result of, and in consequence of the failure of defendant to keep a sufficient supply of water in the hydrants and water-pipes adjacent to said property. To the complaint, defendant filed the following demurrer: "Now comes the said defendant, by Messrs. Johnson & Johnson, its attorneys herein, and demurs to plaintiff's complaint in the above-entitled action filed, on the ground that it appears on the face thereof: 1. That said complaint does not state facts sufficient to constitute a cause of action; 2. That 621 said complaint is ambiguous, unintelligible and uncertain: 1. In that, while it attempts to hold said defendant liable for the destruction of plaintiff's property through the alleged failure of defendant to furnish sufficient water supply, it does not allege or set forth any contract between defendant and said plaintiff to furnish such water supply, or any water supply whatever, for fire purposes; nor does it allege that plaintiff and defendant ever in any manner contracted for such a water supply, or that any consideration was ever paid, or promised to be paid, by plaintiff to defendant therefor; 2. In that it does not allege that plaintiff was a party to the said contract between said defendant and Boise City for supplying water for extinguishing fires, nor show any privity of contract between said plaintiff and said Boise City in relation to said contract on which to base this action; 3. In that it does not show that any duty or obligation existed on the part of said defendant to said plaintiff to furnish him a supply of water for protection from fire." The district court sustained the demurrer and plaintiff declined to amend. Judgment was rendered for defendant for costs, from which judgment this appeal is taken.

The questions, or rather the question, for there is really but one question to be considered, raised by this appeal, has been frequently before the courts of this country, and the decisions have been uniformly against the contention of appellant. In

fact appellant cites but one case, and we have been unable to find another—that of Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249—which supports his contention. We have examined that case with much care, and, while it may be conceded that the rule of decision therein announced would cover the case at bar, it may not be amiss to call attention to the difference in the contracts upon which the two actions were brought. In the Kentucky case the defendant “agreed [as set forth in the opinion] to erect upon a platform fifty feet high a standpipe, twenty-two feet in diameter, and one hundred and seventy-five feet high, with which was to be connected the conducting pipes and hydrants mentioned; and also two pumping engines, each having a capacity to force into <sup>622</sup> the standpipe two million gallons of water every twenty-four hours; and to keep a head of water sufficient to throw from any eight of the hydrants simultaneously, and for five consecutive hours at any one period of time, streams through fifty feet of hose one hundred feet high; . . . that appellee also agreed to have in the standpipe and conducting pipes at all times a supply of water sufficient to afford a head or pressure requisite for all domestic, manufacturing, and for protection purposes for all the inhabitants and property of the city,” etc.—a very different contract from that set forth in the record in this case; and, in addition to this, the water company, in the Kentucky case, the plaintiff, had a special private contract with the defendant for a water supply. What influence these facts may have had upon the decision in that case is, of course, matter of conjecture; but it could hardly, upon the facts, be accepted as an authority in the case under consideration here. All of the cases, or nearly all, in which this question has been raised, have held that the want of privity in the contract debars the individual citizen from suing in cases of contract between a water company and the municipal corporation: *Mott v. Cherryvale etc. Mfg. Co.*, 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989. In *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784, although the contract contained a clause to the effect that, “should said company, from lack of water supply, or from other cause, except providential or unavoidable accident, fail to furnish a reasonable supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such failure or neglect,” the court held that this gave no right of action to the individual citizen against the water company. To the same effect is

the case of *Anderson v. Fitzgerald*, 21 Fed. 294. In *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126—an Iowa case, a similar case to that under consideration—the court say: “The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom by the protection of her property in common with all other persons whose property is similarly situated does not <sup>623</sup> make her a party to the contract, or create a privity between her and the defendant”: See, also, *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; *Clark v. City of Des Moines*, 19 Iowa, 212, 87 Am. Dec. 423; *McPherson v. Foster*, 43 Iowa, 57, 22 Am. Rep. 215; *Jones on Negligence of Municipal Corporations*, sec. 31; *Beck v. Kittenning Water Co. (Pa. St.)*, 11 Atl. 300; *House v. Houston Waterworks Co. (Tex. Civ. App.)*, 22 S. W. 277; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1, and note; and numerous other authorities to same effect.

There is nothing in the contract in this case which intimates that any breach of the contract between the city of Boise and the defendant was to inure to the benefit of any citizen who might consider himself aggrieved. What rights or remedies exist as between the parties to the contract we are not called upon to decide. One of the rules—a primary rule—in the construction of contracts by courts is to ascertain as near as possible the actual intention of the parties at the time they entered into the contract. It will hardly be contended, we apprehend, that either the city or the water company ever intended, or ever contemplated, the assuming by the latter of such a liability as the contention of the plaintiff would impose upon them. To undertake to review the multitude of cases cited by respondent would be a profitless task. It seems to us they are conclusive of the question herein, to wit, as to the liability of the defendant to the plaintiff under the contract set forth in the complaint. The order and judgment of the district court is affirmed, with costs.

Morgan, C. J., and Sullivan, J., concur.

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*The Holding of the Principal Case* is probably sustained by the weight of authority. However, in at least two states, Kentucky and North Carolina, a contrary rule prevails: See the monographic note to *Baxter v. Camp*, 71 Am. St. Rep. 196, 197.

## CLEVELAND v. ANDREWS.

[5 Idaho, 65, 46 Pac. 1025.]

**EXEMPTION OF TEAM—Drayman not yet in Business.**—If a person purchases a team with the bona fide intention of engaging in the business of a teamster or drayman, the horses are exempt from levy, although he has not yet actually entered upon such business. (p. 166.)

Quarles & Willis and R. P. Quarles, for the appellants.

Reeves & Terrell, for the respondent.

**67** HUSTON, J. The facts in this case as they appear in the record are substantially as follows: The plaintiff, having been injured while in the employ of a railroad, was compelled to seek other means of earning a livelihood for himself and family, and to this end purchased a pair of horses and was negotiating for a wagon with the intention of engaging in the business of a teamster or drayman, a business in which he had been engaged prior to his employment by the railroad company. Before he had completed his outfit, the horses were seized, upon a writ of attachment issued against plaintiff, by the defendant Andrews, as constable. Plaintiff brings his action of claim and delivery against defendant Andrews as constable, and the other defendants as sureties. The cause was tried by a jury who rendered a special verdict for plaintiff, and from the judgment entered upon such verdict, this appeal is taken. The only question raised by this record is: Was the property levied upon exempt under the statutes of Idaho?

Subdivision 6 of section 4480 provides that: "Two oxen, two horses, or two mules, etc., by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living, etc.," is exempt from execution. It is contended by appellant that as the plaintiff had not actually engaged in the business of a drayman or teamster at the time the levy was made, the property does not come within the provisions of the statute.

While courts should be careful, that the beneficent purposes of statutes like the statute of exemptions are not made the means or excuse for fraud, it is equally important that the palpable intent of the law should not be defeated by mere technicalities or strained construction. No suspicion is cast upon the bona fides of the plaintiff in this action. The evidence shows



conclusively that he was acting in the utmost good faith, and was proceeding as speedily as was possible under the circumstances in which his misfortunes had placed him to engage<sup>68</sup> again in the business or a vocation in which he was engaged before his employment by the railroad company. We think his case is clearly within the spirit and intent of the statute, that the horses were exempt: See *Elliot v. Hall*, 3 Idaho, 421, 35 Am. St. Rep. 285, 31 Pac. 796.

The judgment of the district court is affirmed with costs.

Morgan, C. J., and Sullivan, J., concur.

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*Exemption Statutes* are construed liberally to effect the purposes for which they are enacted: *Equitable Life etc. Soc. v. Goode*, 101 Iowa, 160, 63 Am. St. Rep. 378, 70 N. W. 113; *Rustad v. Bishop*, 80 Minn. 497, 81 Am. St. Rep. 282, 83 N. W. 449; *Roberts v. Parker*, 117 Iowa, 389, 94 Am. St. Rep. 316, 90 N. W. 741. See, too, *Geiger v. Kobilka*, 26 Wash. 171, 90 Am. St. Rep. 733, 66 Pac. 423; *State v. Land*, 108 La. 512, 92 Am. St. Rep. 392, 32 South. 433. A horse used in drawing a dray and worth not over forty dollars, comes within the term "farm horse," as used in the Georgia statute, notwithstanding his employment may be urban, rather than rural, in character: *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990. Temporarily suspending the exercise of his trade, with the intention of resuming it, does not render a mechanic's tools subject to levy: See the monographic note to *Kilburn v. Demming*, 21 Am. Dec. 549.

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## DAVIS v. ADA COUNTY.

[5 Idaho, 126, 47 Pac. 93.]

**A COUNTY is not Liable for a Tort**, unless expressly made so by statute. (p. 168.)

**COUNTY—Negligent Construction of Bridge.**—A county is not liable for negligence in the construction and maintenance of bridges, unless made so by statute. (p. 168.)

George H. Stewart, for the appellant.

Hawley & Puckett, for the respondent.

<sup>128</sup> SULLIVAN, J. This is an action to recover damages for the negligent, improper and unskillful construction and maintenance of a certain bridge and approach to the bridge across Boise river at Boise City, in Ada county, by means of which it is alleged the waters of said river were diverted and changed into a new and narrow channel, insufficient in width to permit the water of said river to flow freely and without ob-

struction, and thereby forced said water over against the north bank of said river, and caused said bank to cut away and flow over the lands of the plaintiff, by reason of which thirty acres of plaintiff's land were washed away and destroyed. A claim for the damages thus alleged to have been sustained by the plaintiff was presented to the board of county commissioners of said Ada county for allowance, which claim was rejected by said board. Thereupon the plaintiff brought this action against Ada county. The case was tried to a jury, and at the close of plaintiff's evidence the defendant moved for a nonsuit, which motion was granted, and judgment of dismissal and for costs was duly entered. This appeal is from the judgment.

The motion for nonsuit was based upon several grounds, all of which appear in the transcript. It is conceded by both parties that the vital question is whether the county is liable to the plaintiff for the injury stated in the complaint, and proven upon the trial. The appellant contends, under various provisions of our constitution and statutes, that counties should be held liable for negligence in the construction and maintenance of highways and bridges to the same extent as cities, as they seem to be, substantially, placed on the same footing under the law. This view is sustained by some very respectable <sup>129</sup> authority. Thompson in his work on Negligence (volume 1, page 618), referring to the case of Hedges v. Madison Co., 6 Ill. 571, in which Shields, J., said: "All the cases assume the ground that there is no corporate fund provided for that purpose," says: "Where, therefore, counties are erected into corporations, provided with a corporate fund, or the power of raising it, and invested with the care of highways and bridges, the reason of the rule ceases, and the rule ought to fall with it. They should stand upon the same footing, in this regard, as chartered cities." In Elliott on Roads and Streets, page 324, footnote 3, is found the following statement: "In discussing the subject of bridges, we have shown that the prevailing doctrine is opposed by many well-reasoned cases and by many eminent text-writers." However, the decided weight of authority is that a county is not liable for a tort, unless expressly made so by statute. We have no such statutory provision. In section 963 of 2 Dillon on Municipal Corporations, the following language is used: "According to the prevailing rule, counties are under no liability in respect of torts except as imposed (expressly or by implication) by statute. They are political divi-

sions of the state, created for convenience, and are usually regarded not to be impliedly liable for damages suffered in consequence of neglect to repair a county road or bridge. Such a liability, unless declared by statute, is generally, but not universally, denied to exist." In section 999 of 2 Dillon on Municipal Corporations, the author groups the decisions upon the question under consideration as follows: 1. When neither chartered cities nor counties or other quasi corporations are held to an implied civil liability. Only a few states have adopted this extreme view of exempting cities from liability in this respect; 2. Where the reverse is held, and both chartered cities and counties are alike considered to be impliedly liable for their neglect of the duty in question. This doctrine prevails in a small number of states; 3. Where municipal corporations proper, such as chartered cities, are held to an implied civil liability for damages caused to travelers for defective and unsafe streets under their control, but denying that such liability attaches to counties or other quasi corporations <sup>130</sup> as respects highways and bridges under their charge. This distinction has received judicial sanction in a large majority of states, where the legislation is silent in respect of corporate liability." It is also stated in Elliott on Roads and Streets, page 40: "Most of the courts deny that there is any liability on the part of counties or townships," unless the liability is imposed by statute: See, also, Worden v. Witt, 4 Idaho, 404, ante, p. 70, and note, 39 Pac. 1114; Gorman v. Commissioners, 1 Idaho, 655. We are not disposed to change the rule as accepted by the decided weight of authority upon the question under consideration. If it is desirable to have the rule changed, the legislature has ample authority to change it, and to make the county liable for negligence in the construction and maintenance of the public highways and bridges, where damage and injury are sustained by reason of such negligence. Judgment affirmed. Costs awarded to respondent.

Morgan, C. J., and Huston, J., concur.

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*Counties are not Liable in Tort*, according to the weight of authority, unless made so by statute. Most of the cases wherein it is attempted to hold them liable grow out of negligence in constructing and maintaining roads and bridges: See the monographic note to Gilman v. County of Contra Costa, 68 Am. Dec. 294; Bailey v. Lawrence County, 5 S. Dak. 393, 49 Am. St. Rep. 881, 59 N. W. 219; County Commrs. v. Ball, 22 Colo. 125, 55 Am. St. Rep. 117, 43 Pac. 1000; Packard v. Voltz, 94 Iowa, 277, 58 Am. St. Rep. 396, 62 N.

W. 757; Heigel v. Wichita County 84 Tex. 392, 31 Am. St. Rep. 63, 19 S. W. 562; Downing v. Mason County, 87 Ky. 208, 12 Am. St. Rep. 473, 8 S. W. 264. Compare Schussler v. Board of Commrs., 67 Minn. 412, 64 Am. St. Rep. 424, 70 N. W. 6; Wabash County v. Pearson, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134; Lehigh County v. Hoffort, 116 Pa. St. 119, 2 Am. St. Rep. 587, 9 Atl. 177; Rohrbough v. Barbour County Court, 39 W. Va. 472, 45 Am. St. Rep. 925, 20 S. E. 565.

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## GREEN v. STATE BOARD OF CANVASSERS.

[5 Idaho, 130, 47 Pac. 259.]

**CONSTITUTION—Amendment of.**—The “Majority of the Electors” referred to in a constitution as requisite to the ratification of an amendment thereto, means the majority of the electors voting upon the question of amendment, and not a majority of all the electors of the state or of those voting at the election. (pp. 171, 179.)

Hawley & Puckett, W. E. Borah and Miles W. Tate, for the plaintiff.

George M. Parsons, attorney general, and Johnson & Johnson, for the defendants.

**133** HUSTON, J. The constitution of the state of Idaho contains the following provisions in regard to amendments of that instrument:

### “ARTICLE 20.

#### “Amendments.

“Section 1. Any amendment or amendments to this constitution may be proposed in either branch of the legislature, and if the same shall be agreed to by two-thirds of all the **134** members of each of the two houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals; and it shall be the duty of the legislature to submit such amendment or amendments to the electors of the state at the next general election, and cause the same to be published without delay for at least six consecutive weeks, prior to said election, in not less than one newspaper of general circulation published in each county; and if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution.



"Sec. 2. If two or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately.

"Sec. 3. Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this constitution, they shall recommend to the electors to vote at the next general election for or against a convention; and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall, at the next session, provide by law for calling the same; and such convention shall consist of a number of members not less than double the number of the most numerous branch of the legislature.

"Sec. 4. Any constitution adopted by such convention shall have no validity until it has been submitted to, and adopted by, the people."

The legislative assembly of the state of Idaho, at its third session, submitted to the people, under said constitutional provisions, the following amendment of the constitution: "Shall section 2 of article 6 of the constitution of the state of Idaho be so amended as to extend to women the equal right of suffrage?" The vote as returned by the canvassing board upon said question was as follows: "For proposed amendment extending to women the equal right of suffrage: For, twelve thousand one hundred and twenty-six; against, six thousand two hundred and eighty-two." And upon this return said board declares said amendment not adopted; and petitioner brings <sup>135</sup> her action for a review of the action of said board of canvassers in this behalf.

The only question submitted to us for decision is as to the construction to be given to the last paragraph of section 1 of article 20, above quoted: "And if the majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution." The question presented is by no means a novel one. In fact, so able and experienced a jurist as Judge Thomas M. Cooley admits (Cooley's Constitutional Limitations, 6th ed., 747, note 1) that "it must be confessed that it is impossible to harmonize the cases." An examination of the large number of authorities cited by counsel in the argument of the case accentuates the statement of Judge Cooley, and perhaps we shall not be obnoxious to the charge of evading a duty should we decline to enter upon a task which

so eminent a jurist declares to be hopeless. We confess ourselves unable to appreciate the argument which would make the language of section 1 of article 20 and section 3 of said article synonymous or expressive of the same intention. If they were, as counsel for defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. It is true, the amendment under consideration is one of vast importance, but so, likewise, are the other amendments submitted at the same time. With the character or importance of the amendment we have nothing to do in this consideration. Was the amendment adopted as required by the terms and provisions of the constitution? To hold that it was not is virtually to say that no amendment of the constitution is practicable. In fact, counsel do not strenuously contend for a construction involving such a conclusion, but rather insist that the words "majority of the electors," in section <sup>136</sup> 1, should be construed to mean the same as the words "majority of all the electors voting at such election," in section 3. Even the authorities cited by counsel do not go to such an extent or sustain such a conclusion.

For us to go into an analysis of all the authorities cited and read upon the argument would accomplish nothing. We have carefully examined them all, in the light of the able arguments of counsel, and we find ourselves unable to base our conclusions upon any apparent weight of authority. We must decide this case upon the provisions of our constitution as the same appear to us, and, so doing, we are compelled to say that the construction contended for by the petitioner is the correct one. Experience has shown that it is almost, if not quite, an impossibility to secure an expression from every elector upon any question, and, above all, upon a question of an amendment of the constitution; and it is equally difficult to ascertain the actual number of electors at any given time. To rely upon the vote cast upon some other question at the same election would be entirely unsatisfactory, and such a construction is, we think,

at least impliedly negatived by the provisions of section 3. While it is true that some ten thousand or more electors would seem to have been entirely indifferent upon the question of the adoption of this and the other amendments, still all were—must have been—fully advised as to the importance of the questions submitted, and should their indifference be taken as conclusive of their opposition to the amendments? Upon what rule of honesty or righteousness can this be claimed? Is it not more reasonable, as well as more righteous, to say that in a matter about which they manifest such indifference their silence shall be taken as assent? We hold that the amendment under discussion is adopted, and has become a part of the constitution of the state of Idaho.

Sullivan, J., concurs.

MORGAN, C. J., Concurring. At the last general election in the state of Idaho, which occurred in November, the following question was submitted to the electors of the state, to wit: "Shall section 2 of article 6 of the constitution of the state of Idaho be so amended as to extend to women the equal <sup>137</sup> right of suffrage?" The vote of the electors on the proposed amendment was as follows: For said amendment, twelve thousand one hundred and twenty-six; against said amendment, six thousand two hundred and eighty-two. The question submitted to this court is: "Under the provisions of the constitution and laws of this state, does this amendment become a part of the constitution?" No question of like importance has been submitted to this court during its existence. If decided in the affirmative, it nearly doubles the qualified voters of the state. It demands careful investigation and considerate judgment. It may not be improper, therefore, for me to give my reasons for concurrence in the judgment of this court.

The question of the policy or practicability of such a radical change in the fundamental law of the state, in regard to the qualification of electors, not being an issue in this cause, I do not propose to discuss. The proposition that the language of the constitution with reference to amendments thereto makes it practically impossible to secure any such I shall also dismiss, with the statement that it is not the province nor within the authority of this court to change or modify its provisions by judicial decision.

The provisions of our own constitution, and of others similar thereto, with reference to the votes necessary to carry any proposition, may be properly divided into three classes:

First, those which require a majority or two-thirds of all the votes cast at a general or special election. Of this class is section 3 of article 8, regarding county and city indebtedness, which requires "two-thirds of the qualified electors thereof voting at an election to be held for that purpose"; that is, two-thirds of the qualified electors of such county or city. Also of the same class is section 1 of article 12, which provides "that cities and towns may become organized whenever a majority of the electors at a general election shall so determine." So is also section 3 of article 20, which provides that when it shall be deemed necessary to call a convention to revise or amend the constitution, which shall be called if a majority of all the electors voting at said election shall have voted for a convention, etc. The language of these sections is clear and unmistakable. It needs no construction, and it is only necessary <sup>138</sup> to count the ballots cast at any such election and those voting for the proposition, to ascertain if a majority of all those voting at said election were in favor of the proposition.

Of the class of cases cited in support of this proposition are *St. Joseph Tp. v. Rogers*, 16 Wall. 664, in which case the fourteenth section of the act required only a "majority of the legal voters of such township voting at such election." Of the same tenor is the case of *People v. Warfield*, 20 Ill. 165, in which it is held that the phrase "majority of the voters of a county" is held to mean a majority of those voting at the election. Also, *People v. Garner*, 47 Ill. 246; *People v. Wiant*, 48 Ill. 263; *Cass Co. v. Johnston*, 95 U. S. 360; *State v. Linn Co. Court*, 44 Mo. 504; *State v. Renick*, 37 Mo. 270. From this class of cases we have, perhaps sufficiently quoted. They differ from the language of our constitution in the particular under discussion in this, that in those cases the law or constitution, as the case may be, positively and in terms requires a majority or two-thirds of all the voters of a particular district or of the state, while our constitution requires a majority of the electors. They are not in point except as giving the reasons for the decisions, which differ somewhat in the different cases. In some cases the reason given is that it is a practical impossibility to ascertain how many legal voters there may be at the time of the election in any given city, county, or state.



This reason applies with equal force in the case at bar. There is no necessity for qualifying the word. It is impossible to ascertain how many voters there are in the state at any election. There may be many voters in the state who did not vote for governor, for instance, who did vote for the presidential electors; and there may have been many voters who voted for attorney general, who voted neither for governor nor presidential electors. The impossibility of the task is apparent at once. But, say the defendants, this is what the constitution requires, and, if it means anything except a majority of the electors voting upon the proposition, the former is what it does mean. However, they say this provision is satisfied by considering the number voting at this election, as the whole number of electors. But we know this is not true, and we <sup>139</sup> have no warrant for such construction, either in the words of the particular section, the context, or in reason.

The second class of cases are those which require a majority of all the qualified voters of a particular district, county, city, or of the qualified voters of the state. This provision would seem to be too plain to need any construction, or to lead to any difference of opinion. The courts, however, in quite a number of cases, have construed this provision to be satisfied by a majority of the votes cast upon the proposition, while others have construed it according to the strict letter of the constitution or law, as the case may be. Of the latter class are the following cases, cited by counsel for defendants, to wit: *State v. Brassfield*, 67 Mo. 331 (in which case the constitution of Missouri states that a county, city, or town shall not be authorized to become a stockholder, etc., unless two-thirds of the qualified voters of such county, city, or town, etc.); *Hawkins v. Board of Supervisors*, 50 Miss. 735. The same provision is in the constitution of Mississippi (article 12, section 14): *Cocke v. Gooch*, 5 Heisk. 310. "No part of a county shall be taken off without the consent of two-thirds of the qualified voters in such part": Tenn. Const., art. 10, sec. 4; *Duke v. Brown*, 96 N. C. 127, 1 S. E. 873. Same provision in the constitution of North Carolina, article 7, section 7. These decisions are not in point, for the provisions in the various constitutions are all of the second class, as quoted above, and are radically different from our own provision in section 1, article 20. The decisions are instructive, however, as indicating the trend of the opinions held by the various courts of the country upon this subject. Of precisely the same tenor is the constitution of Illinois, as quoted

in *People v. Brown*, 11 Ill. 478. Also statute of Illinois, as construed in *Chestnutwood v. Hood*, 68 Ill. 132. It required a "majority of all the legal voters of the county." In *People v. Town of Berkeley*, 102 Cal. 298, 36 Pac. 591, also, the constitution required, in terms, a "majority of the electors voting at a general election." It would manifestly be a bootless, and certainly a very monotonous, undertaking, to follow through all the decisions upon a precisely similar provision of statutes and constitutions. They are substantially the same.

140 The third class are those which require a majority vote in the affirmative, without the specifications attached to the other classes. In this class the term "plurality of votes" is spoken of as being sufficient or insufficient to adopt a constitutional amendment, both in brief of defendant and in some of the decisions of the courts. The term must have been used inadvertently, as there can be no plurality of votes unless there are three or more candidates, or three ways of voting upon a proposition, as a plurality is the number of votes received by one candidate, in excess of those received by either one of two or more other candidates, and not a majority over both. There can be no plurality where there are but two candidates, or but two ways of voting on a proposition, as upon a constitutional amendment. Section 2 of article 18 of the constitution of Idaho requires two-thirds of the qualified electors of a county, voting on the proposition at a general election in favor of removal, to remove a county seat. Section 3 of article 18, relating to the division of counties, requires a majority of the qualified electors of the territory proposed to be cut off voting on the proposition at a general election to divide a county. Section 3 of article 20 (the next section of the same article), in which is the provision under discussion, requires, in order to a call a convention to revise or amend the constitution, that "a majority of all the electors voting at said election shall have voted for such convention, at the next general election." Evidently, it was not the intention of the framers of the constitution to require either one of these conditions to secure an amendment to the constitution. If it had been, they would have so expressed it, and at a time when the different methods of making the constitution were fresh in their minds; but they did not do so, and therefore we must conclude they did not intend it. It may be said, however, that if they had intended that only the votes cast for and against this amendment should be considered, they would have so expressed it, as in section

9 of article 7, in section 1 of article 8, and section 2 of article 10. While they have not used the same words in sections 1 and 2 of article 20, we contend they have substantially said so. Section 2 of article 20 provides that, "if two or more amendments are proposed, they shall be submitted in such manner <sup>141</sup> that the electors shall vote for or against each of them separately." Here is a positive direction that the elector shall vote either for or against the proposition. This is followed by the statute (1st Sess. Laws, sec. 57, p. 75), providing that, when the question of a constitutional amendment is to be submitted to the people, a space of half an inch shall be left opposite the words "Yes" and "No," printed upon the ballot, on which the voter is to make a cross opposite the answer he desires to make. This was followed by an amended section 57, page 95, of Third Session Laws of Idaho, in which it is provided that a circle half an inch in diameter shall be made opposite the words "Yes" and "No," when the same or a similar question is to be submitted, in which the voter is to make a cross opposite the answer he desires to make.

In Senate Joint Resolution No. 2, approved January 21, 1895, the same legislature provided that the following question shall be submitted to the electors of the state: "Shall section 2 of article 6 of the constitution be so amended as to extend to women the equal right of suffrage?" In accordance with the constitution and the statute, the question was submitted with the words "Yes" and "No" printed in separate spaces, with a circle of the required size opposite each, in one of which each voter who desired to express an opinion on the question was required to make a cross. Why should the constitution and two different legislatures provide that those who desired to vote against the proposition should make a cross opposite the word "No" if these votes were not to be counted, and why should they be counted if all those who did not vote at all were to be counted as having voted "No"? There is no answer. The constitution and the statutes say: "All you electors who believe that equal right of suffrage should be extended to women stand up and be counted." Twelve thousand one hundred and twenty-six voters stand up, and are counted in the affirmative. The constitution and statutes say with equal distinctness: "All you qualified electors who believe that the equal right of suffrage should not be extended to women stand up and be counted." Six thousand two hundred and eighty-two stand up and are counted. Eighteen thousand four hundred

and eight votes in all were cast upon the question. <sup>142</sup> But, say the defendants, there were about ten thousand qualified voters in the state who did not vote at all on the question, that should be counted as having voted "No." Why should they be counted in the negative? The constitution does not require it, neither do the statutes. These electors either have no opinion on the subject, or they have none that they care to express. Why should they be counted as having voted in the negative, when they did not vote at all on the subject? There is absolutely no reason, unless the constitution or the statutes require it, and we have seen they do not.

The supreme court of Maryland, in *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711, in construing an act of submission of the question of high license to the voters of a county, wherein it is provided that the act shall take effect if a majority of the voters of said county shall determine by their ballots in its favor, holds that those voters absenting themselves, and those who, being present, abstain from voting, are considered as having acquiesced in the result, and that the measure is adopted if it receives a majority of those voting upon it, even though it fail to receive a majority of the votes cast upon some other subject: *Cass Co. v. Johnston*, 95 U. S. 369. The supreme court of Minnesota, in *Dayton v. City of St. Paul*, 22 Minn. 400, construes the following provision of the constitution of the state: "And if it shall appear in a manner provided by law that a majority of the voters present and voting shall have ratified such alterations or amendments, the same shall be valid to all intents and purposes as a part of the constitution." The court declares that "the amendment is ratified if it receives a majority of all the votes upon it, although not a majority of the votes cast at the election." The court says further that "it is the general rule in affairs of government that an election or a voting, whenever called for, is to be determined by the votes of those who vote to fill the office which is to be filled, or for or against the proposition which is to be adopted or rejected, and not by counting on either side those who do not vote at all." And this, in my opinion, is the true rule, as those who express no opinion should not be counted as having expressed any on either side. This is a government by the people who have opinions, and <sup>143</sup> are willing to express them. Representatives are elected both in Congress and the legislature. Officers are elected, constitutions are framed, and laws enacted, and, of right, ought to be, by these men, and by these only: See, also, *Taylor v. Tay-*



lor, 10 Minn. 107 (Gil. 81). In *State v. Barnes*, 3 N. Dak. 319, 55 N. W. 883, the court says: "Congress passed an enabling act permitting North Dakota to call a convention, formulate a constitution, submit it to the people, at the same time submit separate articles which required for their adoption a majority of the legal votes cast." The supreme court held that an article which was submitted under this clause, and received a majority of the votes cast upon this question, was adopted, although it did not receive a majority of the votes cast for governor. The language is much stronger than in the case at bar. In *People v. Clute*, 50 N. Y. 461, 10 Am. Rep. 508, the court says: "It is the theory and practice of our government that a minority of the whole body of qualified electors may elect to an office when a majority of that body refuse or decline to vote for anyone for that office. Those who are absent from the polls, in theory and practical result are assumed to assent to the action of those who go to the polls; and those who go to the polls, and do not vote for any candidate for an office [that express no opinion], are bound by the result of the action of those who do; and he who receives the highest number of earnest, valid ballots is the one chosen to the office." The supreme court of Kansas, in *Board of Commissioners v. Winkley*, 29 Kan. 36, says that "at a general election for county or township officers, if a majority of the votes cast are for a bounty for the growing of hedges, the county commissioners shall declare the law to be in full force and effect." Held, that if a majority of the votes cast upon that question are for the proposition, it is legally adopted, notwithstanding it failed to receive a majority of all the votes cast at the election for township officers. In the case of *St. Joseph Tp. v. Rogers*, 16 Wall. 664, the thirteenth section of the act then under consideration provided that where elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of the proposition, then, etc. It will be noticed that this language is much stronger <sup>144</sup> than the language under discussion in this cause; as in section 1, article 20 of the constitution, the language is that if a majority of the electors shall ratify the same, it shall become a part of the constitution, etc.; and in the above cause (*St. Joseph Tp. v. Rogers*, 16 Wall. 664) the court hold that a majority of the legal voters of the township voting at the election was sufficient to authorize the subscription, although all the voters voting on both sides were together but a minority of all the legal voters of the township. In *People v. Warfield*, 20

Ill. 165, the court further says: "If we go beyond this, and inquire whether there are other voters of the county who were detained from the election by absence or sickness, or voluntarily absented themselves from the polls, we should introduce an interminable inquiry, and invite contest in elections of the most harassing and baneful character, if we did not destroy all the practical benefits of laws passed under those provisions of the constitution."

Here, then, are a number of decisions which declare that, when a constitution or statute declares that a proposition requires a majority or two-thirds of all the voters of a given locality, such provision is satisfied if the proposition receives a majority or two-thirds, as the case may be, of all those voting, taking no account whatever of those, be the number large or small, who fail to vote. It is admitted that if a special election was authorized and held on this question, and it appeared that three thousand votes or a less number were cast for the proposition, and fifteen hundred against it, it would be legally adopted. This is a distinction without a difference, as in this case the amendment is voted on separately, precisely the same as it would be if no other question was presented, or no officers were to be elected, and the vote taken and reported to the canvassers separately in the same way it would have been had this been the only question before the electors for their decision.

To recapitulate, then: Neither the constitution nor the statutes require either a majority of all the qualified voters of the state, or a majority of all the votes cast at the election. It is clear that the decided weight of authority in such cases is that the proposition is decided in the affirmative if it receives <sup>145</sup> a majority of all the votes cast upon the question. By many of the courts it is considered that those who absent themselves from the polls, or, being present, do not vote upon the question, assent to the will of the majority who do vote upon the question. By this court it is held that those who have no opinion on the subject, or none that they care to express, not having voted on either side of the question, should not be counted upon either side. As to this question they are not qualified voters.

For the reasons stated, I concur with opinion expressed by Mr. Justice Huston.

*An Election or Question* referred to the decision of the majority of the voters of a county is decided by a majority of the votes polled; voters not attending the election are presumed to concur with the majority of those attending: *Louisville etc. R. R. Co. v. County Court*, 1 Sneed, 637, 62 Am. Dec. 424. And the word "house," as applied to a branch of the legislature, means a number of members sufficient to constitute a quorum to do business; and an amendment to the constitution ratified by two-thirds of a majority of all the members elected is ratified by two-thirds of that house: *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636.

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## COUNTY OF ADA v. BULLEN BRIDGE COMPANY.

[5 Idaho, 188, 47 Pac. 824.]

**CANCELLATION OF COUNTY WARRANTS.**—If an Adequate Legal Remedy exists, either affirmative or defensive, a suit cannot be maintained to cancel county warrants alleged to have been illegally issued. (p. 183.)

**CANCELLATION OF INSTRUMENTS.**—A Court of Equity Will not Interfere to decree the cancelation of a written instrument, unless some special circumstance is shown to exist, establishing the necessity of a resort to equity to prevent irreparable injury. (p. 184.)

**COMPELLING CLAIMS to be Waged.**—A County may compel the holders of alleged illegal warrants to wage their claims thereon, or forever abandon them. (p. 184.)

**AN ACTION to Compel an Adversary to Wage His Claim**, as provided by the Idaho statutes, is an action at law, triable in the ordinary course of law, and by a jury, unless waived. (p. 185.)

Suit for the cancellation of certain county warrants. The case first came before the supreme court in *County of Ada v. Bullen Bridge Co.*, 5 Idaho, 79, 47 Pac. 818, on appeal from a judgment of the trial court sustaining a demurrer to the complaint. By this complaint it appeared that certain warrants which the defendants held, or in which they claimed some interest, had been issued under and pursuant to a contract entered into between the board of county commissioners of Ada county, in the state of Idaho, and the Bullen Bridge Company for the erection of a bridge and for the payment of certain specified sums therefor, and that at the time such contract was entered into, the board had no power to act, for the reason that its action would increase the indebtedness of the county beyond the amount permitted by the constitution of the state. The prayer of the complaint was for the cancellation of certain warrants remaining unpaid, and that they be decreed and adjudged to be null and void. A demurrer was interposed to this complaint, which was sustained by the trial court. On appeal, the judgment of that court was, on the first hearing, reversed, and the

cause remanded, with instructions to overrule the demurrer of the defendants with leave to answer. Afterward, however, a rehearing was granted.

Hawley & Puckett, for the appellant.

George A. Stewart and Johnson & Johnson, for the respondent.

**192** SULLIVAN, C. J. A petition for rehearing was granted. The cause was first submitted to this court without oral argument, but on this hearing the case was fully presented by oral argument and printed briefs. A number of additional authorities were cited. As the facts of the case are fully stated in the former opinion, it is not necessary to repeat them here. The appeal is from the order and judgment of the district court sustaining a demurrer to the complaint. This is a suit, in equity, for the cancellation of certain county warrants issued by the plaintiff county to the defendant, the Bullen Bridge Company.

Respondent contends that this action cannot be maintained for the reason that the plaintiff has a plain, speedy and adequate remedy at law, and for this reason, the decision of the trial court on the demurrer should be sustained, while the appellant, the county of Ada, contends that the action of the court below in sustaining the demurrer to the complaint should be reversed. The appellant contends that sufficient facts are stated in the complaint to authorize the interposition of a court of equity and to warrant such court to grant the cancellation of said county warrants and cites section 921 of Dillon on Municipal Corporations. In that section the author lays down the following rule: "A municipal corporation may in its own name bring suit, in proper cases, to be relieved against illegal, unauthorized or fraudulent acts on the part of its officers."

We do not dispute this principle but indorse it. The distinguished author says such suit may be brought in a "proper case." He does not intimate that a bill in equity would lie to cancel a written contract where the party has an adequate remedy at law, where such remedy would be adequate, certain and complete. If there is no legal remedy, adequate, certain and complete, a municipal corporation may maintain a bill in equity to cancel warrants illegally issued.

**193** The appellant cites *Andrews v. Pratt*, 44 Cal. 309, as a case directly in point sustaining its contention. The facts in



that case were very different from the facts in the case at bar. In that case the plaintiff was a resident taxpayer of Placer county, and three of the defendants composed the board of supervisors of said county, and the fourth one was the treasurer thereof. The board of supervisors were authorized by law to sell certain railroad stock, owned by the county, which they did, and for services in negotiating and making said sale, they, each, individually filed a claim against the county for fifteen hundred dollars for their services therein, which claims were allowed by said claimants acting as a board, and warrants issued to each of said officers for the sum of fifteen hundred dollars. By the laws of that state, the compensation and fees of members of the board of supervisors were fixed. The law also provided that no other fees or compensation than that provided by statute should be allowed to the members of such board.

Under the law, the members of said board were not entitled to compensation for the sale of the stock referred to. The warrants sought to be canceled remained in their hands at the time of the commencement of said suit. While in the case at bar, the record shows that the warrants referred to in the complaint are not in the hands of the parties to whom they were issued, but have passed into other hands, or at least third parties have acquired interests in them; that the county has received a bridge costing many thousand dollars and other improvements for which said warrants were issued. No tender of said bridge and improvements is made by the appellants to respondents. This statement of facts is sufficient to show that the case cited is a very different one from the case at bar.

And further no offer is made by the county to place defendants in statu quo. This was not considered on the former hearing of this case. Equity would not permit the county to retain the bridge and other improvements and have said warrants canceled. One of the fundamental principles of equity is, "He who asks equity must do equity," even in favor of one who has entered into and executed a voidable contract: <sup>194</sup> *Oakland v. Carpentier*, 21 Cal. 642. However, the decision on the case at bar is not based upon the ground that the county failed to offer to do equity, but on the ground that plaintiff has an adequate remedy at law. Other cases are cited by the appellant. Those were held to be "proper cases for the intervention of a court of equity," while under our statute, in the case at bar, the county has an adequate remedy at law.

Conceding that the county treasurer would not be liable in case he should pay said warrants before the final determination of their legality or illegality, in an action at law, no doubt the court, upon a proper showing, would grant an order restraining the treasurer from paying them until final judgment was obtained in regard to their legality. The county warrants which are sought to be canceled by this action are not negotiable under the law-merchant. The power to cancel a written instrument is a purely equitable remedy, and is a remedy that will not be granted, or is a power that will not be exercised unless there is some special ground for it. The warrants, being non-negotiable, cannot pass into the hands of bona fide holders, so as to divest the county of any defense it may have against their payment.

In section 914 of 2 Pomeroy's Equity Jurisprudence the principle involved in this case is stated as follows: "The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain and complete."

The doctrine there enunciated is not changed or modified by the laws of this state. The rule is the same in states where the code practice exists as in the state where separate courts of chancery are maintained. In the state of New York, where the code practice obtains, it was held in the *Globe Ins. Co. v. Reals*, 79 N. Y. 202, as follows: "The case presented furnishes no ground for the interference of a court of equity. Such a court will not interfere to decree the cancellation of a written instrument, unless some special circumstance exists establishing the necessity of a resort to equity to prevent an <sup>195</sup> injury which might be irreparable and which equity alone is able to avert. That a defense exists is insufficient. Nor is it enough that the evidence be lost."

In *Allerton v. Belden*, 49 N. Y. 373, the court says: "The right to the relief exists only where from the form of the security the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of equity is shown." In *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495, it is said: "A court of equity will not interfere to decree

the cancellation of a written instrument unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert." To the same effect is *Grand Chute v. Winegar*, 15 Wall. 373; *Edelman v. Latshaw* (Pa.), 28 Atl. 475.

Where the invalidity of an instrument appears on its face or where there is no danger of the instrument passing into the hands of an innocent holder, and where there is an adequate remedy at law, a court of equity will not take jurisdiction and decree the cancellation of such instrument: *Story's Equity Jurisprudence*, sec. 700a; *Atlantic Delaine Co. v. James*, 94 U. S. 214. In *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71 (which was an application for an injunction to restrain the payment of certain county warrants), the court holds that there was a complete and adequate remedy at law and therefore equity could not be invoked: See, also, *Morgan v. County Commrs. etc.*, 4 Idaho, 418, 39 Pac. 1118; *Rogers v. Hayes*, 3 Idaho, 597, 32 Pac. 259; *Clark v. Dayton*, 6 Neb. 192.

In *Farmington Village Corp. v. Sandy River Nat. Bank*, 85 Me. 46, 26 Atl. 965, the doctrine applicable to this case at bar is clearly stated. That was a bill in equity praying for a perpetual injunction against the defendants, enjoining them from negotiating or delivering certain bonds issued by said corporation. It is there held that a court of equity, in a proper case, has full power to order the cancellation of bonds or other written instruments. But that it is a power which the court in its discretion will exercise with care, and only in accordance with what the court believes to be proper and right under the circumstances, <sup>196</sup> and that such power will not be exercised where the legal remedy, either affirmative or defensive, would be adequate, certain and complete. To the same effect is *Atlantic Delaine Co. v. James*, 94 U. S. 207, and *Town of Glastenbury v. McDonald*, 44 Vt. 450.

In this case the county need not wait for the defendants to sue on said warrants, but it can force defendants to do so, by virtue of the provisions of section 4928 of the Revised Statutes, which is as follows: "An action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation."

This statute provides a complete and adequate remedy against the delay of defendants in bringing suit upon said warrants,

and may be invoked on behalf of the county. In such suit any legal defense which the county has against the payment of said warrants may be interposed. Section 4928, supra, is the same as section 1055 of the California Code of Civil Procedure and is a transcript of section 527 of the old Practice Act of California.

In *Lewis v. Tobias*, 10 Cal. 578, which was a suit in equity to compel the surrender and cancellation of a promissory note, the court held that said section afforded an adequate remedy. The court says: "If the doctrine contended for by respondent be at all debatable elsewhere, it is more clear here, for we have a statute whereby a party may force his adversary to wage his claims, or else forever abandon them." Again the court says: "While if we recognize the principle invoked by the respondent, we must necessarily admit that in every case in which the payor of a note, or bond, or other money security has a defense to it, though purely legal, we must admit him, at his pleasure, into a court of equity, deny the holder a trial by jury, and permit the payor to take the place of the actor in a proceeding to test his liability. We see no necessity for such a principle, and we think it would produce only confusion, and that it starts with a denial of a positive right of the holder. If the holder unreasonably delays to sue, the payor may force him to do so under the statute." The case of *Lewis v. Tobias* is affirmed in *Smith v. Sparrow*, 13 Cal. 569, and in *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747.

**197** The action provided for by said section 4928 is an action at law and triable in the ordinary course of law, and by jury unless waived: *Taylor v. Ford*, 92 Cal. 419, 128 Pac. 441. If the county has a legal defense to the payment of said warrants, by permitting it to come into a court of equity, the defendants would be deprived of a trial by jury. The defendants would thus be deprived of a positive right which the law gives them.

The former decision in this case is reversed, and the order of the trial court in sustaining the demurrer and the judgment entered therein are sustained.

Costs of this appeal awarded to respondents.

Huston and Quarles, JJ., concur.

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*The General Rule* is often laid down, though not strictly adhered to, at least by some courts, that equity will not entertain a suit to cancel a writing when there exists an adequate remedy at law: See *Fitzmaurice v. Mosier*, 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854, and note; *Vannatta v. Lindley*, 198 Ill. 40, 92 Am. St. Rep. 270, 64 N. E. 735.



## VERMONT LOAN AND TRUST COMPANY v. HOFFMAN.

[5 Idaho, 376, 49 Pac. 314.]

**CONTRACT, When Valid, Though Prohibited by Statute.**—An act prohibited under a penalty imposed by statute, the prohibition being for the protection of the public revenue, and the act being neither *malum in se* nor *malum prohibitum*, is not void. (p. 191.)

**LOANING MONEY Without Taking Out a License.**—If a statute requires, under a penalty, that persons engaged in loaning money shall pay a license tax, a failure to comply with the statute does not preclude the right to recover money loaned. (p. 192.)

**USURY—Compound Interest.**—**Corporation Notes** given for the interest of the principal debt which, by their terms, draw interest after maturity, contravene the statutes of Idaho forbidding compound interest, and are usurious, and only the principal can be recovered, without interest or costs. (p. 194.)

**USURY.**—**A Foreign Corporation** engaged in loaning money in this state cannot avoid its usury laws simply by making the evidences of indebtedness payable in some state where the laws against usury are less onerous. (p. 195.)

James E. Babb, for the appellants.

A. E. Gallagher and Forney, Smith & Moore, for the respondent.

381 **QUARLES, J.** The plaintiff, a foreign corporation, brought suit to foreclose a certain real estate mortgage executed by the defendants, Ross Hoffman and his wife, Bell Hoffman, to secure to plaintiff four promissory notes dated November 1, 1892, for seven hundred dollars each, payable, November 1, 1897, with coupon notes for the annual interest on said respective notes attached thereto, said coupon notes being by their terms payable, each series, as follows, to wit: No. 1, payable January 1, 1893; No. 2, January 1, 1894; No. 3, January 1, 1895; No. 4, January 1, 1896; No. 5, January 1, 1897; and No. 6, November 1, 1897; and each of said coupon interest notes, by its terms, drawing interest from the maturity thereof. The defendants, Hoffman and wife, answered, raising only one question, the answer alleging as follows, to wit: "That at all times in the complaint mentioned the plaintiff was a corporation organized and created as such under the laws of the territory of Dakota, for the purpose of loaning money and other purposes; that at all said times said plaintiff was engaged in the occupation of loaning money at interest in the counties of Latah and Nez Perces, in the state of Idaho, and had a known, and its principal, place of business in Idaho at Moscow, in Latah county,

382 Idaho; that the consideration of the principal note and mortgage described in the complaint was a loan of money at interest; that said loan was made by said plaintiff in said Latah county, Idaho, while engaged in the business of loaning money at interest in said county, as aforesaid; that the plaintiff never at any time procured any license to engage in the occupation of loaning money at interest, either in Latah or Nez Perces county, Idaho, and never paid for any license to engage in any such occupation in either of said counties. By reason whereof plaintiff, in making said loan, and taking said note and mortgage, was violating the laws of the state of Idaho, and the same are null and void." To the said answer the plaintiff filed a general demurrer, which was sustained, and said defendants declined to further plead, but elected to stand on their said answer, whereupon the court rendered a judgment and decree of foreclosure in favor of plaintiff for the sum of three thousand four hundred and ninety-one dollars and eighteen cents and the ordinary costs of the action in the sum of seventeen dollars and ninety-five cents. The plaintiff, in the complaint, alleged that the defendants had paid all of said coupon interest notes numbered Nos. 1 and 2, but had failed and refused to pay the other coupon interest notes, and had refused and failed to pay said principal notes. It will thus be seen that the defendants had paid in interest the sum of three hundred and sixty-four dollars on said indebtedness. The demurrer to said answer admitted the facts pleaded in the answer, and those facts are to be regarded by this court as established.

The first question that arises is this: Was the transaction void, or is the plaintiff precluded from recovering on said contract by reason of its failure to procure a license to do the business of loaning money? Section 1636 of the Revised Statutes provides: "A license must be procured immediately before the commencement of any business or occupation liable to a license tax from tax collector of the county where the applicant desires to transact the same, which license authorizes the party obtaining the same in his town, city, or particular locality in the — county to transact the business described in such license." Section 1644 of the Revised Statutes requires "persons, associations, or corporations engaged in the occupation of banking, loaning money at interest," etc., to pay a license tax, the amount of such tax varying according to the classification enumerated in said section. Section 6893 of the 383 Revised

Statutes is in the following language to wit: "Every person who commences or carries on any business, trade, or profession or calling for the transaction or carrying on of which a license is required by any law of this territory (state), without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." The appellants contend that under the statutes, *supra*, the consideration for the notes and mortgage in question was illegal; that the respondent was prohibited from doing such business; that the contract of the parties was made in violation of law, and therefore void; that owing to the illegality of the consideration of said contract, the same having been made in violation of law, the court could grant no relief to the respondent. Counsel for appellants has spent much time in research, and has cited many authorities in support of his position. The general rule, as urged by appellants, that a contract founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so, is correct, and well established by authority. But in applying the rule many courts have excepted from its operation one class of cases, viz., when the statutory prohibition is found in a statute enacted for the purpose of raising revenue or the regulation of traffic or business, when, unless it is manifestly the intention of the statute to make the contract void, the court will treat the contract as valid. Mr. Sutherland, in his admirable work on Statutory Construction, at section 366, in treating the question under consideration, very aptly says: "When a statute is for revenue purposes, or is a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest, the contract will be valid." And in support of the rule Mr. Sutherland, in a footnote, cites many authorities among the following which support the text, as we have seen by a careful examination of the cases, to wit: *Harris v. Runnels*, 12 How. 79; *Brooklyn Life Ins. Co. v. Biedsoe*, 52 Ala. 538; *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720; *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 Barn. & C. 93; *Parton v. Hervey*, 1 Gray, 119; *Bly v. Second Nat. Bank*, 79 Pa. St. 453; *Pangborn v. Westlake*, 36 Iowa, 546; *Bemis v. Becker*, 1 Kan. 226; *Lindsey v. Rutherford*, 384 17 B. Mon. 245; *Strong v. Darling*, 9 Ohio, 201; *Watrous v. Blair*, 32 Iowa, 58; *Foster v. Railway Co.*, 13 Com. B. 200; *O'Hare v. Second Nat. Bank*, 77 Pa. St. 96; *Vining v. Bricker*, 14 Ohio St. 331.

The following are other authorities supporting the rule laid down by Mr. Sutherland, cited above, which we have examined, to wit: *Fackler v. Ford*, 24 How. 322; *Mandlebaum v. Gregovich*, 17 Nev. 87, 45 Am. Rep. 433, 28 Pac. 121; *La France Fire Engine Co. v. Town of Mt. Vernon*, 9 Wash. 142, 43 Am. St. Rep. 827, 37 Pac. 287, 38 Pac. 80; *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346; *Bowditch v. New England etc. Ins. Co.*, 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Edison General Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 40 Am. St. Rep. 910, 36 Pac. 260; *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49; *Pacific Trust Co. v. Dorsey (Cal.)*, 13 Pac. 148; *National Bank v. Matthews*, 98 U. S. 621; *Washburn Mill Co. v. Bartlett*, 3 N. Dak. 138, 54 N. W. 544; *Wright v. Lee*, 2 S. Dak. 596, 51 N. W. 706; *Toledo etc. Lumber Co. v. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 20 Am. St. Rep. 395, 45 N. W. 408; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Corning v. Abbott*, 54 N. H. 469; *Aiken v. Blaisdell*, 41 Vt. 655; *State Mut. Fire Ins. Assn. v. Brinkley Stave etc. Co.*, 61 Ark. 1, 54 Am. St. Rep. 191, 31 S. W. 157; *Rahter v. First Nat. Bank*, 29 Pa. St. 393; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *De Mers v. Daniels*, 39 Minn. 158, 39 N. W. 98; *Walter A. Wood etc. Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *United States v. Martin*, 94 U. S. 400. In *Lindsey v. Rutherford*, 17 B. Mon. 245, the court said: "The dealing in bills of exchange, in view of the statute, is neither *malum in se* nor *malum prohibitum*. Contracts for their sale and purchase are not prohibited by the statute. They are neither evil in themselves nor evil because forbidden by the statute. The statute strikes no blow at the business itself, but simply declares upon this subject that, 'if any person shall carry on, conduct, or engage, directly or indirectly, in the business of a broker or exchange dealer, by the purchase of bills of exchange, etc., without a license besides the tax imposed, he shall forfeit and pay to the commonwealth one thousand dollars.' The business may be carried on. The business itself is not prohibited. It is lawful to deal in bills 385 of exchange. But, if carried on without a license, the person doing so shall forfeit and pay to the commonwealth one thousand dollars. We conclude, therefore, that our statute in this regard is essentially a revenue measure, designed to raise



revenue from a business esteemed by the legislature as very profitable, and authorizing the requisition of a tax from him who thinks proper to engage in the business." In *Pangborn v. Westlake*, 36 Iowa, 546, the court said: "We are, therefore, brought to the true test, which is that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if from all these it is manifest that it was not intended to imply a prohibition, or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." A statute in California made eight hours a legal day's work on public works, and required a stipulation to that effect to be incorporated in all contracts for public work. The supreme court of that state (*Babcock v. Goodrich*, 47 Cal. 488—where such stipulation had been, in violation of the statute, omitted) held the contract valid, and, among other things, said: "It is not made a consequence of an omission to insert this stipulation that the contract shall be void, and the omission, therefore, does not operate a forfeiture of the rights of the parties under the contract. If a county shall contract directly with the laborer, it will not be contended that the former may refuse to pay the latter his hire because he had worked too many hours, or had not, by express stipulation, limited the time which should constitute a day's work. The law was passed for the protection of the laborer. An officer of the county cannot refuse to carry out a contract because of an omission which renders the contract more favorable to the county." And in *United States v. Martin*, 94 U. S. 400, the supreme court of the United States said, in a case similar to the one in California: "We regard the statute chiefly as in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contract shall be based upon that theory. It is a matter between the principal and his agent, in which a third <sup>386</sup> party has no interest. . . . We are of the opinion, therefore, that contracts fixing or giving a different length of time as the day's work are legal, and binding on the parties making them." In *Larned v. Andrews*, 106 Mass. 437, 8 Am. Rep. 346, the court said: "It is to be observed that the act does not expressly declare that sales by a wholesale dealer who neglects to pay the tax shall be illegal. The tax is not laid upon each sale, but upon the business or calling. The illegality does not

attach to the sale, but consists in not paying the tax imposed upon the business. . . . These and other considerations lead us to the conclusion that it was not the intention of Congress to prohibit and make unlawful each sale made by a wholesale dealer who neglects to pay his tax. The object of the tax was to provide internal revenue to support the government, and not to regulate domestic trade in the states. It imposes a tax upon wholesale dealers, and provides a penalty if they neglect to pay such tax. We think this was designed to operate upon the person, and not upon the business. If Congress had intended to subject the dealer neglecting to pay his tax to the additional liability of having all his sales rendered illegal, we think they would have so declared in unequivocal terms." The same line of reasoning was adopted by Judge Hawley in *Mandlebaum v. Gregovich*, 17 Nev. 87, 45 Am. Rep. 433, 28 Pac. 121.

From a careful study of all of the authorities, we think that the better class of authorities and the better reasoning leads to the conclusion that, where the prohibition is implied from a penalty imposed, as in the case at bar, the prohibition being for the protection of the public revenue, and no declaration in the statute making the prohibited act void, the doing of such act is not illegal. There is nothing in our statutes which makes it unlawful to loan money at interest. There is nothing in our statutes which says that it is unlawful to follow the business of loaning money at interest. Such business is not *malum in se*, nor is it *malum prohibitum*. Anyone may conduct the business, but, under our statute, if he does so, he must obtain the license; and if he carries on such business without paying the license tax and obtaining the license, he is guilty of a misdemeanor. The offense consists, not in doing the business, for that is not prohibited, but in failing to pay the license tax. The statute was passed, not to protect the public, not to <sup>387</sup> protect the borrower, nor to prevent the loaning of money at interest, but for the purpose of raising the revenue to be derived from the license taxes to be collected from those persons who should engage in the business of loaning money at interest. Section 6983 of our statutes, *supra*, was enacted to protect the public revenue, not for the purpose of making void any contract made in violation of it. Take the case at bar. The respondent loaned two thousand eight hundred dollars to the appellants. The respondent was doing the business of loaning money at interest, in violation of law, without the license. This was a fraud upon the public revenue, but was no injury to

the appellants. For such failure the legislature has said to respondent: "You are guilty of a misdemeanor. The assessor and collector may direct suit against you, and recover the license tax imposed by statute, together with twenty dollars damages." But the legislature has not further said that "you shall not recover back any money which you may loan at interest before paying such license tax." It is the duty of the court to construe all of our statutes which relate to the subject in question in *pari materia*, and ascertain what the intention of the legislature was as to the validity of the contract in question. A careful consideration of the said statutes, of the subject matter and object to be obtained, convinces us that it was not the intention of the legislature that a violation of section 6983, *supra*, should be attended with any penalty other than those prescribed by the statutes. If the act of loaning money at interest was injurious to morals or good society, or prohibited by law, we could not come to this conclusion. The legislature may, within the limits of the constitution, prescribe traffic regulations, and may impose upon a business a tax, and require persons intending to engage in such business to obtain, before doing so, a license; and we think the legislature might go one step further, and say that whcever should engage in any business upon which a license tax is imposed without first paying such license tax, should not only be fined and imprisoned, one or both, but that such person should not recover upon any contract made by him while engaged in such business without a license. But the legislature has not done so, nor has it shown any intention to attend such forfeiture upon a person violating the statute. Having specified the penalty for a violation of the statute, and further provided for <sup>388</sup> the collection of the license tax with damages, we are authorized to and do conclude that the legislature did not intend that any further punishment should be inflicted. This conclusion is strengthened by the well-known principle that forfeitures are not favored in law; nor does this court favor the idea of giving one's goods to another without compensation. We think that the respondent clearly has the right to recover back the money which it loaned to the appellants.

But another serious question arises in this case, which we will now consider. The interest coupon notes attached to each of the four principal notes, and numbered from 1 to 6 in the respective series, by their terms draw interest from their maturity. Section 1264-1266 of the Revised Statutes of Idaho are as follows:

"Sec. 1264. Parties may agree in writing for the payment of any rate of interest on money due or to become due on any contract, not to exceed the sum of one and one-half per cent per month; any judgment rendered on such contract bears interest at the rate of ten per cent per annum until satisfied.

"Sec. 1265. Compound interest is not allowed, but a debtor may agree in writing to pay interest upon interest overdue at the date of such agreement.

"Sec. 1266. If it is ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or in property, such contract works a forfeiture of ten cents on the hundred by the year, and at that rate upon the amount of such contract, to the school fund of the county in which the suit is brought and the plaintiff must have judgment for the principal sum less all payments of principal or interest theretofore made and without interest or cost. The court must render judgment in said action for ten per cent per annum upon the entire principal in said contract, against the defendant in favor of the state for the use of the school fund of the county, whether the unlawful interest is contested or not; and in no case where unlawful interest is contracted for must the plaintiff have judgment for more than the principal sum less the payments already made, whether the unlawful interest be incorporated with the principal sum or not. But <sup>389</sup> no indorsee in due course of negotiable paper is affected by any usury exacted by any former holder of such paper unless he has actual notice of the usury previous to his purchase; but in no such case the judgment above provided in favor of the school fund must be entered against the drawer or maker, if a party to the action, and he may recover back the usury paid from the party who received the same."

Section 1265, *supra*, limits the right of the parties to contract under section 1264, *supra*, and forbids the agreeing to pay compound interest, except in one case only, to wit, when interest is past due, a party may, in writing, agree to pay interest on such overdue interest. The appellants contend that the judgment in this case, which gave to respondent the amount of the principal notes, the amount of the unpaid interest coupon notes, with interest on the latter, was erroneous, and that the respondent is not entitled to recover on said mortgage indebtedness anything more than the original principal less all



payments heretofore made in principal or interest, and we agree with the appellant in this particular. We are aware that the supreme court of the United States, in *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704, and in other cases, has held that the interest coupons of municipal bonds draw interest after maturity according to the law of the place where such coupons are, by their terms, payable. In Wisconsin it was repeatedly held that where, by the terms of an instrument, interest became due at certain specified times, compound interest was allowable upon each installment of interest after the maturity of such installment. And in Texas it was held in *Lewis v. Paschal*, 37 Tex. 315, that compound interest was allowable. In the latter case the rule was justified on the ground that it was not prohibited by the statutes of Texas. We apprehend that it will not be questioned but that the legislature can regulate the matter of interest, and may prohibit altogether compound interest. It is no answer to the statute in the case at bar to say that the compound interest provided for in the coupon notes when added to the simple interest falls below the legal and contractual rates provided by our statutes. When no rate is agreed upon, our statutes fix the rate, and at the time the contract in question was made, the legal rate was ten <sup>300</sup> per cent, and where the parties were not satisfied with this rate they could, by agreement in writing, fix any rate desired with these restrictions. They could not agree upon a rate higher than one and one-half per cent per month, or provide in advance for compound interest. The coupon notes in question were usurious, providing as they did for interest upon interest which was not overdue at the time they were made. It appears from the allegations of the complaint that the coupon notes Nos. 1 and 2 of each of the series, amounting in all, as we gather it from the complaint, to the sum of three hundred and sixty-four dollars, were paid by appellants before this action was commenced. The respondent cannot be entitled under the statutes, *supra*, to judgment for more than the principal sum loaned by it to the appellants, less said interest payments, and without interest or costs, and to this extent only its mortgage security is good. The interest being forfeited under the statutes, *supra*, and the principal debt not due by the terms of the contract, no interest being past due, and the principal not yet due, the query suggests itself, Was not this suit prematurely brought? And an affirmative answer also suggests itself. Probably the appellants waive such question if they fail to raise it. It is the duty of the trial courts to see

that the provisions of section 1266, *supra*, are carried out, and to inflict the penalty therein provided, without suggestion so to do from any source. The judgment is reversed, and the cause remanded for further proceeding consistent with this opinion. Costs of appeal awarded to appellants. Reversed and remanded.

Sullivan, C. J., and Huston, J., concur.

#### ON REHEARING.

HUSTON, J. We have had occasion heretofore to say that the proposition that the court in its consideration of a case has not been limited to the briefs or oral arguments in the case, will not be considered as a ground for rehearing. We are permitted, whenever we deem further argument, either written or oral, essential to the proper presentation of any question, to call for it; but this does not involve or include the right of counsel, whenever they think they have not said enough, to insist upon a rehearing. Although somewhat lengthy, we have, <sup>391</sup> in view of the importance of the case, and the fact that the questions involved are new in this jurisdiction, given the petition in this case a more than ordinary consideration. We find but two questions or contentions presented by the petition. The first is as to the interest coupons, and it is contended that they do not come within the prohibition of our statute. We cannot recognize the contention of petitioner in this regard. The statute is plain and unequivocal, and to permit its evasion through such a flimsy pretext as that presented in the petition in this case would be inexcusable at least. Counsel cite many authorities which he claims are definitive of what usury is. It is only necessary, in answer to them all, to say that what is usury within any state or jurisdiction is what the law of such state or jurisdiction declares to be such, and the courts thereof, in the administration of the law, must be governed thereby. The other contention of petitioner, that the notes which the mortgage sought to be foreclosed in this case were given to secure were made payable in the state of Vermont, and that, therefore, the contract must be construed by the laws of that state, is not only utterly untenable, but not one single authority of the multitude cited by counsel in his petition supports the contention. The proposition simply states this: A foreign corporation, having a resident agent in this state, engaged in the business of loaning money upon interest, may avoid the laws of this state in regard to such business, and especially in regard

to usury, by simply making the evidences of indebtedness payable in some other state, where the laws against usury are less onerous. The monstrosity of the proposition is too apparent to require comment, and in support of it we have cited to us the following authorities: "A bill of exchange may even be drawn in another state to take advantage of a higher local rate of interest, and be governed by the law of such state; but, if a note is void for usury wher made, it will be void everywhere, although it may have been made payable elsewhere as a cover for the usury": 1 Randolph on Commercial Paper, sec. 28. Again: "Of course, the note being payable at the residence of the payee, and having been delivered there for goods sold there, must be deemed and taken to be a West Virginia contract": *Tenant v. Tenant*, 110 Pa. St. 478, 1 Atl. 532. Again: "The <sup>392</sup> notes were made and payable in this state, and in determining their validity and effect they must be regarded as New Hampshire contracts." In *Shoe and Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753, the note was executed in Kentucky, and made payable in Kentucky. The court said: "Under our decision, these various circumstances determine the place where the contract was executed, and where it was to be consummated. It was clearly a Kentucky contract, and is to be governed by the laws of that commonwealth." Without a single exception, the authorities cited in the petition are to this effect, and are all cases arising upon commercial paper and in transitory actions, and how they can be said to uphold the contention that a corporation in the state of Vermont can loan money upon mortgages upon land situated in Idaho, by and through an agent, necessarily a resident of Idaho, the debtor being a resident of Idaho, and the contract made in Idaho, and may, in attempting to enforce a claim only enforceable in Idaho, insist that the laws of Vermont shall be the rule of construction of such contract, when the corporation is organized in the state of North Dakota, simply because, for the palpable purpose of evading the usury laws of Idaho, the notes were in terms made payable in Vermont, is a proposition we cannot entertain. This being purely an action in rem, and the enforcement of the claim being only maintainable in Idaho, how can it be contended that the intention of the parties was that the laws of Vermont should obtain in the construction of the contract? The matter of usury is peculiarly statutory. It has no recognition in the common law, and the legislation in regard to it in the various states of

the Union has been as diversified as the ever-conflicting interests of greed on the one hand, poverty on the other, have been dominant. As to the policy of usury laws in the abstract, it is not our province to discuss that subject. We are simply called upon to administer the law as we find it. It is no part of the duty of the court to make law by construction to suit a given case, or serve a persistent contention, backed though it may be by whatever influence predicated upon an assumed policy. Judge-made law is becoming daily more obnoxious to deserved criticism, and is pernicious in its tendency, as being destructive of the elementary principles of our government.

393 The very able and energetic efforts of counsel to do away with the plain and unambiguous provisions of the statute cannot avail. We have examined the statutes of, we think, all of the states upon the subject of usury and interest. We find but one state in which a similar statute to that of Idaho exists, and that is the state of Minnesota. Our statute would seem to have been taken almost literally from that of Minnesota, and we have been unable to find any decision from the supreme court of that state recognizing the construction contended for by the respondent. The rule of the statute is not novel. In *Van Benschooten v. Lawson*, 6 Johns. Ch. 313, 10 Am. Dec. 333, Chancellor Kent lays it down as a principle of equity that "compound interest is not allowed, unless on a special agreement in writing after the lawful interest has become due," and the learned chancellor declares it to be a "well-settled rule," citing Lord Manners, 1 Ball & B. 430; Lord Hardwicke in *Thornhill v. Evans*, 2 Atk. 330, note 1; and this principle has been recognized and maintained by various decisions of the court of last resort in New York: *Mowry v. Bishop*, 5 Paige, 98; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99, and cases there cited. Our statute is but the recognition and embodiment of that principle, and for the courts to attempt to abnegate or abrogate it by construction would be an assumption as wicked as unwarrantable.

Counsel's contention that the several sections of a statute relating to one subject should be construed separately, and not *in pari materia*, not only is not supported by any authority, but is in conflict with the elementary rules of statutory construction. Section 1265 of the Revised Statutes declares in words, "Compound interest is not allowed, but a debtor may agree in writing to pay interest upon interest overdue at the



date of such agreement." By section 1266 of the Revised Statutes, whenever it appears that unlawful interest has been contracted for, "whether the unlawful interest is contested or not," it is provided that "in no case where unlawful interest is contracted for must the plaintiff have judgment for more than the principal sum less the payments already made, whether the unlawful interest be incorporated with the principal sum or not." The contention of counsel that we should ignore the universally<sup>394</sup> recognized rules of construction for the purpose of evading the plain, unambiguous provisions of the statute has all the persistency of Bassanio's plea without the merit arising from the circumstances.

Since the filing of petition for a rehearing, appellant has applied for a restitution of premises under the provisions of section 4825 of the Revised Statutes. The appellant is entitled to restitution, and the district court is directed to issue an order to that effect, it appearing from the record that the premises have been sold under the decree of the district court, and have been purchased by plaintiff. Rehearing denied.

Sullivan, C. J., and Quarles, J., concur.

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*Usury.*—A loan by a foreign corporation to a citizen of this state is solvable by its laws, notwithstanding the loan is stipulated to be paid at the domicile of the corporation, when such stipulation is designed to evade the usury laws of this state: *Pacific States Sav. etc. Co. v. Hill*, 40 Or. 280, 91 Am. St. Rep. 477, 67 Pac. 103. Consult, in this connection, *People's Bldg. etc. Assn. v. Berlin*, 201 Pa. St. 1, 50 Atl. 308, 88 Am. St. Rep. 764, and cases cited in the cross-reference note thereto. The exaction of compound interest as usury is considered in the monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 190, 191. When usury is established, the lender can recover only the principal sum: *Greer v. Hale*, 95 Va. 533, 64 Am. St. Rep. 814, 28 S. E. 873.

*Contracts.*—When a Statute Pronounces a Penalty for an act, a contract founded upon such act is void, although the statute does not pronounce it void, nor expressly prohibit it: *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 73 Am. St. Rep. 31, and cases cited in the cross-reference note thereto. Consult, also, *Henni v. Fidelity etc. Loan Assn.*, 61 Neb. 744, 87 Am. St. Rep. 519, 86 N. W. 475. But it is held that a contract in violation of a law which seeks only the collection of revenue is not void. Thus, a promissory note taken by a peddler in payment of goods sold when he has not taken out the license prescribed by statute is not void: *Banks v. McCosker*, 82 Md. 518, 51 Am. St. Rep. 478, 34 Atl. 539. See, in this connection, *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 78 Am. St. Rep. 852, 37 Atl. 948.

## STATE v. DUCKWORTH.

[5 Idaho, 642, 51 Pac. 456.]

**INTERSTATE COMMERCE—Inspection of Sheep.**—A statute making it unlawful to bring sheep into the state without having them inspected and dipped is repugnant to the commerce clause of the federal constitution. (p. 202.)

**CONSTITUTIONAL LAW—Inspection of Sheep.**—A statute which requires that all sheep brought into the state shall be dipped, and if unsound, dipped twice, while sound sheep within the state, need not be dipped, and diseased sheep need only be quarantined and “spot or hand dressed,” unjustly discriminates against outside sheep, and contravenes the provision of the federal constitution that the citizens of each shall be entitled to all the privileges of citizens of the several states. (p. 204.)

George E. Gray and F. S. Dietrich, for the appellant.

Attorney General McFarland, for the state.

644 SULLIVAN, C. J. The appellant, who was the defendant in the court below, was convicted of the crime of bringing sheep into the state without having first obtained the certificate or permit of the deputy sheep inspector. He waived a jury trial, and the case was submitted to the court on a written stipulation 645 of facts. The defendant was found guilty, and sentenced to pay a fine of one hundred dollars, and five cents per head on three thousand head of sheep, from which judgment this appeal was taken.

The appellant contends that said judgment is erroneous, because the act of the state legislature under which he was convicted is repugnant to certain provisions of the federal constitution: 1. To paragraph 1, section 2, article 4, which provides that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; and 2. To that provision of section 8, article 1, which authorizes the Congress to regulate commerce. The defendant was convicted under the fourth section of an act entitled “An act to amend sections 2, 3, 5, 6, 7, 8, 11 and 12 of an act to create the office of sheep inspector for the state of Idaho; to provide for the appointment and to define the powers and duties of said officer and his deputies and fixing his salary and the compensation of his deputies and providing for the prosecution of offenses in said act,” approved March 12, 1897 (see Sess. Laws 1897, p. 115), which act is commonly called the “Scab Law.” Said fourth section is as follows: “That section 6 of said act is hereby amended to

read as follows: Section 6. Any person, persons, company, corporation or association, intending to bring, or cause to be brought, from any other state or territory into any of the counties of the state of Idaho, any sheep, he or they must first notify the deputy sheep inspector of the district or county nearest to the point of entrance into this state, that at a fixed date he will be within twenty miles from the state line at a designated point, with said sheep for inspection; and it shall be the duty of the deputy sheep inspector to examine such sheep within three days, and if pronounced sound, to immediately dip such sheep once, and then, upon being tendered his compensation as hereinafter provided, issue a permit allowing such sheep to enter this state subject to such regulations as are enforced on resident sheep. But if such sheep are found scabby or infected with any contagious or infectious disease, then the deputy sheep inspector must dip said sheep twice, with an interval from eight to fifteen days between dipping, and then issue a permit for said sheep to enter said state under the same regulations as heretofore provided; provided, however <sup>646</sup> that all sheep must enter said state within three days from final dipping, otherwise permit so issued shall be null and void. And any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, they shall be punished by a fine of not less than one hundred (\$100) dollars, or more than three hundred (\$300) dollars, or by imprisonment in the county jail, not less than two months, nor more than six months, or by both such fines and imprisonment; provided, that any person, persons, company, corporation or association bringing or causing to be brought any sheep into any counties of this state in violation of the provisions of this act, shall be fined in addition to the penalty imposed in this section, five cents per head, for every sheep, so brought into this state, which shall be a lien on said sheep; and it shall be the duty of the deputy sheep inspector to seize and hold such sheep by such means as he deems best, for a period of ten days, and if said sum is not paid within that period, to advertise and sell said sheep, or as many of the same as may be necessary to satisfy and pay such fine and costs." Said section makes it a misdemeanor for any person to bring any sheep into this state without having them first dipped by the sheep inspector. Section 6 of said act provides "that no person, persons, company or corporation within the state of Idaho shall be required to dip his or their bands of sheep be-

tween the first day of December and until such time as he or they can shear such sheep in the following spring," while any person who brings sheep into this state between the first day of December and such time in the spring as such sheep can be sheared must have them dipped before bringing them in, whether the sheep are sound and healthy or not. And it is further provided in said section that: "No person, persons, company or corporation within the state of Idaho shall be required to dip a band or bands of ewes, or any part of them in which there are ewes with lambs, at any time between the fifteenth day of March and the fifteenth day of May following of any year; but they must be held in quarantine and kept separate from sound sheep, and the owner, owners or controller shall be responsible for all damages as stated in this act, to be enforced and recovered as therein provided <sup>647</sup> for." And it is also provided that sheep held in quarantine, which show any scab or contagious disease, shall be "spot or hand dressed" with some reliable medicine. The provisions of that section make a clear discrimination between sheep in Idaho and those that may be brought in between the dates designated. The alleged offense for which the defendant was convicted was for bringing sound and healthy sheep into the state without first having them "dipped" as directed by the provisions of said section 4.

It is contended that said act, and the act of which it is amendatory, are police regulations enacted for the purpose of the suppression and prevention of disease among sheep. The legislature, no doubt, had authority to enact laws for such purpose; but, in so doing, it must not come in conflict with the provisions of the constitution of the United States. Section 2, article 4 of the constitution of the United States is as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." And section 8, article 1, provides, among other things, that the Congress shall have power "to regulate commerce with foreign nations and among the several states and with Indian tribes." Numerous cases involving the construction of statutes similar to the one under consideration have been passed upon by the supreme court of the United States. All decisions from that court give to the commercial clause of the federal constitution a most liberal and salutary construction. And all statutes passed professedly as police regulations have not been tested by the innocent titles they may have, but by their natural and probable



effect upon interstate commerce; and, if found in any manner to harass or burden such commerce, they have been invariably declared void. The leading case in construing the commerce clause of the federal constitution is that of *Gibbons v. Ogden*, 9 Wheat. 1. The construction given that provision by the great Chief Justice Marshall in that decision has not been questioned or doubted. It has been cited and approved in many cases: See *Henderson v. Mayor of New York*, 92 U. S. 259; *Welton v. Missouri*, 91 U. S. 275; *Railroad Co. v. Husen*, 95 U. S. 465; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 648 862; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 11 Sup. Ct. Rep. 855; *Schmidt v. People*, 18 Colo. 73, 31 Pac. 498; *Farris v. Henderson*, 1 Okla. 384, 33 Pac. 380; *State Freight Tax Case*, 15 Wall. 232; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592. Mr. Justice Johnson, in a concurring opinion in *Gibbons v. Ogden*, 9 Wheat. 1, said, "If there was any one object riding over every other, in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints." As defined in that opinion, the term "commerce" means, not only traffic, but also intercourse. When applied to states, it means commercial intercourse as between them. It has been held that the nonexercise by Congress of its power to regulate commerce among the states is equivalent to a declaration by that body that such commerce shall be free from any restriction: *Welton v. Missouri*, 91 U. S. 275.

Applying the rule laid down in the foregoing authorities to the fourteenth section of the act providing for the appointment of a sheep inspector (see Sess. Laws 1895, p. 124), and the fourth and sixth sections of the act amendatory thereof (see Sess. Laws 1897, p. 115), and the facts of this case, it is made clearly to appear that said sections place unnecessary burdens and restrictions upon owners of sheep who desire to bring them into the state, as well as upon transportation companies, and greatly interfere with interstate commerce in the matter of the transportation and sale of sheep, and are therefore repugnant to the commercial clause of the federal constitution, and void. Said section 4 requires any person, company, or corporation intending to bring sheep into the state to notify the deputy sheep inspector that at a fixed date he will have his sheep within twenty miles from the state line, at a designated

point; and it then is made the duty of said inspector to examine such sheep within three days after such notification, and, if such sheep are found to be sound and healthy, to immediately dip them; and then, upon tender of his compensation, he shall issue a permit allowing such sheep to enter the state. But in case such sheep are found scabby, or infected with a contagious or infectious disease, then such inspector must dip them <sup>649</sup> twice, with an interval of from eight to fifteen days between dipping, and then issue a permit. And it is provided that sheep must enter the state within three days from the final dipping, otherwise the permit shall be null and void; and for a violation of said law a penalty of fine or imprisonment, or both, are provided; and a further fine of five cents per head on all sheep brought into this state contrary to, or in violation of, said provisions, is imposed, and made a lien on the sheep. Said act assumes extraterritorial jurisdiction. It authorizes the deputy inspector to proceed into an adjoining state, and there inspect and dip sheep. The fourteenth section of the state sheep inspector law, approved March 9, 1895 (Sess. Laws 1895, p. 124), of which the act of 1897 is amendatory, is as follows: "It shall be unlawful for any person, persons, company, corporation or association, owning, controlling or managing any ferry-boat, toll-bridge, car, steamboat or other things used for transportation, to allow any sheep to be carried thereon, unless the party in charge of said sheep shall first produce a certificate from a deputy sheep inspector appointed under this act, that said sheep are free from scab, scabies and other infectious or contagious disease. Any violation of this section shall be deemed a misdemeanor and punishable by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars." Said section makes it a misdemeanor for any person, company, corporation or association owning, controlling or managing any ferry-boat, toll-bridge, car, steamboat, or other thing used for transportation, to allow any sheep to be carried thereon unless the party in charge of such sheep shall produce a certificate from a deputy sheep inspector. Any violation thereof is made a misdemeanor, and made punishable by fine. In order to procure a certificate or permit from a deputy sheep inspector under the provisions of the act of 1897, all healthy sheep must be dipped once; and said section 14 makes it a criminal offense for any transportation company to bring sheep into the state unless the person in charge of such sheep have a proper certificate from a

deputy sheep inspector. Under the provisions of said acts, sheep cannot be shipped from Washington or Oregon, or from any other state, over the transportation lines in this state, without first unloading such sheep, and <sup>650</sup> having the proper deputy sheep inspector inspect and dip them. To illustrate: Supposing a trainload of sheep are being shipped from Oregon to Chicago over the Oregon Short Line Railroad; if said acts be valid the train must be stopped near the state line of Idaho, the sheep inspected, and, if healthy, dipped by a deputy sheep inspector once, and, if not free from disease, dipped twice. Thereafter, a proper certificate being given to the shipper of said sheep, the train may then proceed. Again, to illustrate: Supposing that Wyoming, Nebraska, Iowa, and Illinois had sheep inspector laws similar to those of Idaho, such sheep would have to be inspected and dipped before entering Wyoming, and again before entering Nebraska, and again before entering Iowa, and again before entering Illinois. It certainly does not require any argument to show that such acts would most seriously harass and burden interstate commerce, so far as the great sheep industry in the west is concerned. The statement of the proposition is sufficient to show to one familiar with the matter that it would not only take days, but weeks, to get a trainload of sheep which were free from disease from the state of Oregon to market in the city of Chicago, and at an expense which even the present prosperous condition of the sheep industry could not long withstand. And, again, said section 4 prohibits the bringing of sound, healthy sheep into the state, at any season of the year, unless they be first inspected and dipped; and the provisions of said section 6 recognizes the fact that it is absolutely impracticable, and very dangerous to the lives of the sheep, to dip them during cold weather, or during the winter months. By requiring all sheep to be dipped before they can be brought into the state, a prohibition is thus set on bringing any sheep into the state during the winter months. The act thus unjustly discriminates against outside sheep, for it provides that sound sheep within the state need not be dipped, and diseased sheep need only be quarantined and "spot or hand dressed," while sound outside sheep can only be brought within the state after first being dipped, and diseased outside sheep must be dipped twice before they can be brought within the state. An unjust discrimination is made against bands of ewes that are out of the state, whose owners desire to bring them

into the state. Said act does not require <sup>651</sup> the dipping of the ewes that are in the state between the fifteenth day of March and the fifteenth day of May following, but it requires all ewes that are brought into the state between those dates to be dipped once if sound and healthy, and twice if infected with contagious disease. The danger of loss being so great, in dipping ewes between said dates, said act is a virtual prohibition on bringing bands of ewes into this state between the dates specified therein. Said act admits that sound sheep, by inspection, may be distinguished from infected ones; that the inspector can easily determine whether a band of sheep is sound or not. It is admitted that the disease known as "scab" breaks out in open sores within ten days after exposure. It is also conceded that said disease is as prevalent in Idaho as it is in the surrounding states, and that Idaho sheep are the same as those of other states, and that scab is as prevalent and natural among sheep in Idaho as it is among the sheep of our neighboring states. In other words, the sheep of our neighboring states are no more the natural habitat for scab, or other infectious diseases to which sheep are subject, than are Idaho sheep. Those facts distinguish the case at bar from those cases in which the constitutionality of laws aiming to protect the cattle of certain states from the ravages of the disease commonly known as "Texas fever" is involved. It is recognized that Texas cattle are the natural habitat for said disease, and if they are excluded from a state, as well as cattle that have come in contact with them, the disease is wholly prevented. It is thus shown that that class of cases is distinguishable from the case at bar. The enactment of a similar statute to the one under consideration, by the states of Wyoming, Nebraska, Iowa and Illinois would result in closing the markets of Kansas City, Omaha, and Chicago to the sheep growers of our state. The burden placed upon the shipper or driver of sheep would be very great, if upon arriving at a state line, he must notify a sheep inspector, and, in case such inspector pronounce the sheep sound and healthy, they must be dipped once before entering such state. Under the guise of inspection and quarantine, said sections place unnecessary burdens and restrictions upon bringing sheep into this state for any purpose whatever, or transporting them through the state to the markets of the <sup>652</sup> east, and make unnecessary and prejudicial discriminations against sheep whose owners may desire to bring them into the state; and they are repugnant to the provisions of the federal



constitution. Said sections are void for that reason, and the judgment of the lower court must be reversed, and it is so ordered. The case is remanded, with instructions to the court below to set aside said judgment, and to discharge the appellant and dismiss said action. Costs of this appeal are awarded to the appellant.

Huston and Quarles, JJ., concur.

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*The Constitutionality of State Statutes* regulating and restricting the importation of livestock, and having for their object the prevention of the introduction of contagious diseases, is considered in Reid v. People, 29 Colo. 333, 68 Pac. 228, 93 Am. St. Rep. 69, and note; notes to Hurst v. Warner, 47 Am. St. Rep. 538, 539; People v. Wemple, 27 Am. St. Rep. 567.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**WAKEFIELD v. VAN TASSELL.**

[202 Ill. 41, 66 N. E. 830.]

**DEEDS—Conditions and Restrictions** inserted in a deed will be upheld, so long as the beneficial enjoyment of the estate is not materially impaired and the public good not violated. (p. 208.)

**DEEDS—Conditions Against Public Policy.**—If conditions in a deed are made in good faith, and nothing malum in se or malum prohibitum is stipulated for, they will not be held to contravene public policy, unless the advantage to the public from so holding is certain and substantial. (p. 210.)

**PUBLIC POLICY** is That Principle of Law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. (p. 211.)

**DEEDS.—A Condition in a Deed That no Grain Elevator** shall ever be built on the four village lots conveyed, or grain ever handled thereon, is valid and enforceable, notwithstanding the building erected is a public warehouse, there being no such warehouse on the premises when conveyed and the condition not affecting all available lands in the community. (pp. 211, 212.)

**DEEDS—Perpetuities.**—A Condition in a deed that no grain elevator shall ever be built on the premises, or grain ever handled thereon, does not violate the rule against perpetuities. (p. 212.)

**EJECTMENT.—An Estoppel in Pais** cannot be invoked in ejectment to defeat the legal title. (p. 212.)

Ejectment for condition broken in a deed. The property conveyed consisted of four town lots along and near a railroad. The condition ran as follows: "That no building shall ever be erected on all or any part of said land hereinafter described, in which to handle grain; and further, that no grain shall ever be handled on said land by the grantee herein, his grantee, administrator, executor, assigns or lessee, or by anyone holding by, through or under him; and if this agreement is broken, said land shall revert to and become the property of the grantors

herein." One Best was the grantee. He subsequently conveyed an undivided one-half interest in the property to Wakefield, and the two together built an elevator thereon and began to handle grain. The grantor then made demand of possession for condition broken and, meeting with a refusal, brought this action.

George B. Foster and Whitmore, Barnes & Boulware, for the appellants.

Arthur Keithley, for the appellees.

**43** RICKS, J. Appellants contend that the deed conveying the premises in question to Best operated as an absolute conveyance in fee, free from all restrictions, or limitations whatever as to any future use to which the premises might be put, for the reasons that the condition in the deed was (1) contrary to public policy and against public welfare; (2) that it violates the spirit of the rule of perpetuities; (3) that it is unreasonable; and (4) that it is inoperative by reason of the intervention of the doctrine of equitable estoppel.

**44** The condition as expressed in the deed is plain and unambiguous and needs not the aid of a court to construe its meaning. Parties have a right to make deeds and insert therein such conditions as they see fit, and contracts entered into freely and voluntarily must be held sacred and be enforced by the courts. As the parties make their deeds and contracts so the courts must take them; and yet they must not be such contracts as are in contravention of the paramount principle of public good. So long as the beneficial enjoyment of an estate conveyed in fee simple is not materially impaired by restrictions and conditions contained in a deed, such restrictions and conditions, as to the mode of its use, are held valid. The enforcement of these conditions by the courts arises from the principle of law that every owner of the fee has the legal right to dispose of his estate either absolutely or conditionally, or to regulate the manner in which the estate shall be used and occupied, as the grantor may deem best and proper. Just so long as the conditions and restrictions are not violative of the public good or subversive of the public interests they will be enforced.

It has been well said that public policy is a variable quality, but that it is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex, and that the principles to be applied have always remained

unchanged and unchangeable. "The relations of society become, from time to time, more complex. Statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old principles are required": *Davies v. Davies*, L. R. 36 Ch. Div. 264. It is not the interest of the parties alone which is to be considered the true test, but in each particular case, under the facts, the judicial inquiry is, Will the enforcement of the condition be inimical to the public interests? and so in *Price v. Green*, 16 Mees. & W. 346, a contract not to carry on the perfume business <sup>45</sup> within six hundred miles of London was held void, the contract being one which the court deemed would be against public policy to enforce; yet in the case of *Nordenfelt v. Maxim etc. Co.* (1894), L. R. App. Cas. 535, where the patentee and manufacturer of guns and ammunition for war purposes transferred his patent to a company and covenanted with the latter not to engage in that business for a term of twenty-five years, it was held that this condition was valid and not against public policy, for the reason that, owing to the nature of that particular business and the limited number of customers to whom sale might be made (being mainly to the governments of countries) the restraint imposed in that case was not larger than was necessary for the protection of the contractee and not injurious to the public interest. In *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793, 26 Atl. 978, it is said: "Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy and therefore void, and not susceptible of enforcement"—as, for instance, an agreement to withdraw an election petition in consideration of money was held void: *Coppock v. Bower*, 4 Mees. & W. 361. And so an agreement to obtain a pardon was held void: *Kribben v. Haycraft*, 26 Mo. 396. Likewise contracts for services known as "lobby services" (*Trist v. Child*, 21 Wall. 441), and a note executed in consideration of the payee agreeing to resign a public office in favor of the maker and using his influence to appoint the latter his successor, are void: *Meacham v. Dow*, 32 Vt. 721. And conditions in general restraint of marriage (*Randall v.*



Marble, 69 Me. 310, 31 Am. Rep. 381), or general restraint of alienation (*Reifsnyder v. Hunter*, 19 Pa. St. 41), or the <sup>46</sup> procuring of a nolle prosequi from the governor (*Wilkey v. Collier*, 7 Md. 273, 61 Am. Dec. 346), or to prevent competition in bidding for government contract (*Gulick v. Ward*, 10 N. J. L. 87, 18 Am. Dec. 389), have been held void as opposed to public policy. But where the condition is made in good faith and stipulates for nothing that is *malum in se* or *malum prohibitum*, before the court should determine the condition to be void, as contravening public policy, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial and not theoretical and problematical: *Kellogg v. Larkin*, 3 Pinn. 123, 3 Chand. 133, 56 Am. Dec. 164. So it has been universally held that conditions in deeds restraining the grantee from selling intoxicating liquors upon the premises are valid: *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145. An agreement not to run a stage-coach on a certain road has been held valid: *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102, and a condition that a party would not, at any time thereafter, own, run or be interested in any line of packet-boats on the Erie canal was held valid: *Chappel v. Brockway*, 21 Wend. 157; also, a condition that a schoolhouse should not be erected on the premises: *McKissick v. Pickle*, 16 Pa. St. 140; or a distillery, or a machine-shop for iron manufacture, or a hospital, or a cemetery, have all been held to be valid conditions: *Plumb v. Tubbs*, 41 N. Y. 444. A stipulation in a deed that the premises conveyed should not be used or occupied as a hotel (*Stines v. Dorman*, 25 Ohio St. 580), and a condition against the erection of a building for the manufacture of resin oil (*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556), and a condition that the grantor should have the exclusive right to sell beer to any public house erected on the land conveyed (*Colt v. Towle* (Eng. Ch. App.), decided in 1859), were held enforceable conditions. A condition that neither the premises nor the building erected thereon was to be used, at any time thereafter, as a public house (*Post v. Bernheimer*, 31 Hun, 247), also a condition in a deed to the county on the <sup>47</sup> express condition that the county would "erect thereon, within five years, a courthouse for the use of the said county, and keep and maintain the same thereon for the space of ten years" (*Pepin Co. v. Prindle*, 61 Wis. 301, 21 N. W. 254), have been held valid. And where an estate was conveyed on the con-

dition of not placing a window on the north side of the house, and the grantor was never the owner of the land adjoining on the north side, and the estate was afterward mortgaged by the grantee, it was held that the whole estate, both of the mortgagor and the mortgagee, was forfeited on condition broken: *Gray v. Blanchard*, 25 Mass. 234.

In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798, this court said: "Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." The question, then, in this case to determine is, Does the condition in the deed have a tendency to be injurious to the public or to be against the public good?

It will be observed that in this deed the only condition contained therein was that no grain elevator should ever be built thereon or grain ever be handled thereon. It left the estate free to be used for any and for all other purposes whatsoever, and was not subversive of the estate and did not destroy or limit its alienable or inheritable character: *Cowell v. Colorado Springs Co.*, 100 U. S. 55. The condition, as made at the time of the deed between the parties, appears to have been a reasonable one, and the intent of the parties to the deed is clear. There is no showing in the record that the situation of the property or surroundings have changed, so as to make the condition at the present time an unreasonable one, and we cannot see that there would result any certain and substantial advantage to the public by holding the condition in this deed void. The parties having seen fit to place such a condition in the deed, the intention <sup>48</sup> being clear and free from doubt, and the same not being *malum in se* or *malum prohibitum* and not contrary to public policy, the court must enforce the same: *Hutchinson v. Ulrich*, 145 Ill. 342, 34 N. E. 556.

In support of appellants' contention that the condition in this deed is contrary to public policy and against the public welfare, attention is called to the fact that the evidence shows that the building erected on the premises in question is a public warehouse and a subject of great public concern, in the encouragement of which the public has an interest, and that any condition which would tend to restrict such encouragement must necessarily be deemed contrary to public policy. At the time of the deed to appellant Best there was no elevator upon the premises or grain

being handled thereon. The condition in the deed became effective upon the delivery of the deed, and the public, so far as it related to the property here involved, could have no interest in a business not then existing thereon. Had the restriction been so broad as to have affected all the available lands in the community from being occupied by a warehouse, or had there been, at the time the deed was made, a public warehouse upon the premises and the condition sought to prohibit the use of such as a warehouse, then a different question might be presented for determination, as to the effect of which we express no opinion. The public is no more injuriously affected by a condition prohibiting the use of a small tract of land in a village for the purpose of a public warehouse than it is affected by a condition prohibiting the use of a tract of ground for a schoolhouse, and in the illustrations above cited there are numerous businesses of great public concern, but their inhibition from limited areas were not deemed to be inimical to public policy.

Nor do we think the contention of counsel for appellants that the condition violates the spirit of the rule of perpetuities can be sustained. In *Gray v. Chicago etc. R. Co.*, 189 Ill. 400, 59 N. E. 950, where one of the conditions of the deed in question was that appellee should maintain a passenger depot at a certain place and stop thereat all its accommodation trains to take and leave passengers, it was contended by appellee that the condition, being perpetual, was illegal and void, and that the appellee held the land free from such invalid condition, but this contention we refuse to uphold; and we think that case decisive of the one at bar as to appellants' objection that the condition violates the spirit of the rule of perpetuities. This disposes of appellants' first, second and third contentions.

Appellants further urge that the condition should not be enforced for the reason that appellees are estopped from claiming under the restriction because they had actual notice of the intention of appellants to erect a warehouse upon the premises, which were vacant, and permitted appellants so to do without hindrance or objection. There is no proof in the record that the appellees stood by and permitted this elevator to be erected upon this property without protest; but even if such were the case, it would not be permissible in an action of ejectment, to invoke estoppel in pais in order to defeat the legal title to the land: *Linnertz v. Dorway*, 175 Ill. 508, 67 Am. St. Rep. 232, 51 N. E. 809.

Appellants insist that the rulings of the trial court in excluding certain evidence tending to show the nature of the business and property interests of appellees in the village of Princeville was erroneous. There was no error in excluding this testimony: *Gray v. Chicago etc. R. Co.*, 189 Ill. 400, 59 N. E. 950.

At the request of appellees the court trying the case without a jury made four holdings as to the law of the case: 1. That the condition in the deed was a valid one and for violation of it appellees could recover; 2. That the condition was not such a restraint of trade as to violate the law or to invalidate the deed; 3. That appellants were estopped from denying the title of <sup>50</sup> appellees at the time of making the deed in controversy; 4. That it was not necessary, in order to enable the plaintiffs to recover, that they should show where they procured their title or what that title was. The appellants offered fifteen holdings, of which the first, third and fourth were held as requested and the remaining twelve were refused. All the refused holdings but the eleventh were upon the proposition that real estate is an article of commerce; that uses to which it should be devoted are constantly changing as the business of the country increases and as its new wants are developed, and it is contrary to public policy to tie up real estate with restrictions and prohibitions as to its uses. This proposition was presented in various forms; some on the theory that it was against public policy because it was in restraint of trade; others upon the theory that the public is interested in public warehouses and in the business conducted in them; and others that such restrictions were against the constitution and laws of the state. The eleventh refused holding was to the effect that the restriction was void because it prevented the building of a public warehouse on the only suitable and available lots in the village; that there was no public warehouse in the village at the time of the execution of the deed, and because, further, the grantor had no other lots or interests in the village. This instruction was refused because it was not applicable to the facts. If the propositions offered on behalf of appellees were properly held, as we think they were, the court did not err in the refusal of those asked by appellants.

Finding no errors in the record the judgment of the circuit court is affirmed.

Boggs, J., did not concur in this opinion.



**VALIDITY OF CONDITIONS AND RESTRICTIONS IN DEEDS.\*****I. In General.**

- a. Essentials of Valid Restriction.
- b. By and Against Whom Enforceable.

**II. Instances of Restrictions.**

- a. Restraint of Marriage.
- b. Restraint on Alienation.
- c. Revesting on Death of Grantee.
- d. Restricting Right of Partition.
- e. Sale of Land from Premises.
- f. Reserving Right to Revoke Grant.
- g. Flow of Light and Air.
- h. Building Restrictions.
  - 1. In General.
  - 2. Effect of Change in Neighborhood.

**III. Restrictions on Use of Property.**

- a. In General—Offensive Businesses.
- b. Sale of Liquors.
- c. Hotels and Public Houses.
- d. Railways and Stations.
- e. Mills and Warehouses.
- f. Public Buildings—Courthouse.
- g. Schools, Churches, Cemeteries, etc.

**I. In General.**

a. **Essentials of Valid Restriction.**—The owner of property, in conveying it, has a right to insert in the deed such conditions and restrictions concerning the use and occupancy of the premises as he sees fit, so long as the beneficial enjoyment of the estate is not materially impaired, and the public good and interests are not violated. This is on the principle that one may dispose of his property, either absolutely or conditionally, as he chooses. However, limitations and restrictions on the use of property are not favored, and although they will be enforced when the intent is clear, ordinarily all doubts will be resolved against them. It is contrary to business policy to tie up property with restrictions and prohibitions on its use: *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. 687; *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556; *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040. Yet, so far as public policy is concerned, as is pointed out in the principal case (*ante*, p. 207), if conditions in a deed are made in good faith, and nothing *malum in se* or *malum prohibitum* is stipulated for, they will not be held to contravene public policy, unless the advantage to the public from so holding is certain and substantial and not theoretical and problematical.

In order to be valid, the conditions and restrictions must not be inconsistent or repugnant to the estate granted: *Pynchon v. Stearns*,

**\*REFERENCES TO MONOGRAPHIC NOTES.**

- Covenants restricting the use of land: 21 Am. St. Rep. 484-708.  
 Conditions in restraint of marriage: 84 Am. St. Rep. 147-152.  
 What words create a condition subsequent: 79 Am. St. Rep. 747-769.  
 Mode of taking advantage of breaches of conditions subsequent: 93 Am. St. Rep. 571-578.  
 Impossibility of performing conditions: 70 Am. St. Rep. 829-837.  
 What conditions violate the rule against perpetuities: 49 Am. St. Rep. 131-136.

11 Met. 312, 45 Am. Dec. 210; Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404, 44 N. W. 984; Carradine v. Carradine, 33 Miss. 698. And they must not be impossible or illegal: Ricketts v. Louisville etc. Ry. Co., 91 Ky. 221, 34 Am. St. Rep. 176, 15 S. W. 182; Raley v. Umatilla, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890. Moreover, they must evince an intention of benefit to the grantor or the public: Mitchell v. Leavitt, 30 Conn. 587; Barrie v. Smith, 47 Mich. 130, 10 N. W. 168.

**b. By and Against Whom Enforceable.**—Whoever purchases land, with notice, constructive or otherwise, of restrictions or conditions imposed upon it by a former vendor, in respect to its use, for certain purposes, or in respect to the manner of building upon it, takes the land subject to such conditions or restrictions. A grantee of property subject to restrictions is bound thereby: Townsend's Appeal, 68 Conn. 358, 36 Atl. 815; Newbold v. Peabody Heights Co., 70 Md. 493, 17 Atl. 372; Peabody Heights Co. v. Willson, 82 Md. 186, 32 Atl. 386, 1077; Hayes v. Waverly, 51 N. J. Eq. 345, 27 Atl. 648; Gibert v. Peteler, 38 Barb. 488; Tallmadge v. East River Bank, 26 N. Y. 105; Anderson v. Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911. As to the right, in general, of a successor in interest of the original grantor to enforce a condition subsequent, see the monographic note to Trustees of Union College v. New York, 93 Am. St. Rep. 572-575. Where the restriction is not imposed in pursuance of a general plan for the improvement of several lots, a subsequent grantee of an adjoining lot cannot enforce it: Haines v. Einwachter (N. J. Eq.), 55 Atl. 38. And a restriction that no structure shall be erected on the lot "further east or nearer Ashland avenue than is the house or building immediately south of said property," is not enforceable in favor of the owner of the building specified, when the only circumstance concerning her claim to the benefit of the restriction is the fact that the grantor in the deed was her father, who had given her the house south of the property conveyed: Hays v. St. Paul M. E. Church, 196 Ill. 633, 63 N. E. 1040.

## II. Instances of Restrictions.

**a. Restraint of Marriage.**—Generally speaking, conditions in absolute or general restraint of marriage, whether of man or woman, are considered void as against public policy. But special restraints, when reasonable, such as against marriage with a particular person, or before attaining a certain age, or without consent, are upheld as valid: Shackelford v. Hall, 19 Ill 211; Bostick v. Blades, 59 Md. 231, 43 Am. Rep. 548; Hughes v. Boyd, 2 Sneed, 512; monographic note to Chapin v. Cooke, 84 Am. St. Rep. 147-152. "It is undoubtedly an established rule of law," says Justice Whitehouse, "that, even with respect to devises of real estate, a subsequent condition which is intended to operate in general and unqualified restraint of marriage, or the natural effect of which is to create undue restraint upon marriage and promote celibacy, must be held

illegal and void, as contrary to the principles of sound public policy. It appears from the early English cases that this doctrine was borrowed by the English ecclesiastical courts from the Roman civil law, which declared absolutely void all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not. But the courts of equity found themselves greatly embarrassed between their anxiety, on the one hand, to follow the ecclesiastical courts, and their desire, on the other, to give more heed to the plain intention and wish of the testator as manifested by the whole will. Thereupon the process of distinguishing commenced for the purpose of preventing obvious hardships arising from the application of that technical rule to particular cases. As a result there has been engrafted upon the doctrine a multitude of curious refinements and subtle distinctions respecting real and personal estate, conditions and limitations, conditions precedent and conditions subsequent, gifts with and without valid limitations over, and the application of the rule to widows and other persons. Indeed, it may be said of the decisions upon this subject with even more propriety than was observed by Lord Mansfield in regard to another branch of law, that 'the more we read, unless we are very careful to distinguish, the more we shall be confounded.' The whole subject as to what conditions in restraint of marriage shall be regarded as void would seem to be involved in great uncertainty and confusion, both in England and in this country. There is clearly discernible, however, through all the decisions of later times, an anxiety on the part of judges to limit as much as possible the rule adopted from the civil law. . . . Beyond the general proposition first stated, the cases seem finally to resolve themselves, for the most part, into the mere judgment of the court upon the circumstances of each particular case': *Mann v. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886. Another expression of judicial opinion, as showing the attitude of modern courts to this question, occurs in *Arthur v. Cole*, 56 Md. 100, 40 Am. Rep. 409, where it is said although the doctrine that conditions in restraint of marriage are void "still prevails, and is everywhere recognized and enforced with greater or less strictness, some of the English judges in recent cases have suggested that the reason upon which the doctrine was originally founded has ceased to exist: *Allen v. Jackson*, L. R. 1 Ch. Div. 399; *Jones v. Jones*, L. R. 1 Q. B. Div. 279. But no case has yet gone to the extent of repudiating the doctrine altogether, though the tendency of modern decisions perhaps is not to extend it, nor to strive to bring within its operation cases which by fair and just construction fall under the well-recognized distinctions and exceptions." See the criticism of the doctrine in *Commonwealth v. Stauffer*, 10 Pa. St. 350, 51 Am. Dec. 489, where it is held that a condition subsequent, in general restraint of marriage, is not void when annexed to a devise of land, though it is otherwise when annexed to a legacy.

Where a brother deeds to his two sisters a leasehold property, to hold as tenants in common for both lives, with remainder to the survivor for life; or so long as both should remain unmarried, and upon the marriage of either, then to the one remaining unmarried for life, the deed contains no condition condemned by the law: *Arthur v. Cole*, 56 Md. 100, 40 Am. Rep. 409. But a grant to a daughter of the grantor if she remains single, otherwise to her children, is held void: *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281. And where land is conveyed to two sisters and their heirs, the deed providing that in case either of them married the land should belong to the other, and that they should not sell or dispose of the property in any manner, if they sell the land, and both die unmarried, the grantee takes a good title: *Munroe v. Hall*, 97 N. C. 206, 1 S. E. 651.

**b. Restraint on Alienation.**—Conditions subsequent offending the rule against perpetuities are considered in the monographic note to *In re Walkerly*, 49 Am. St. Rep. 134-136. As a rule a condition in a deed against alienation is void, because repugnant to the estate granted: *Teaney v. Mains*, 113 Iowa, 53, 84 N. W. 953; *Munroe v. Hall*, 97 N. C. 206, 1 S. E. 651. A provision that the grantee shall not sell the property during her life is in contravention of the principle of public policy forbidding unreasonable restrictions upon the right of alienation: *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668. And in a deed granting a life estate to one, with remainder in fee to his children, a condition against alienation by the grantee or a sale for his debts is void: *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205, 6 N. W. 571.

A condition in a deed that the grantee aliening shall pay part of the price received to the grantor is void: *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470. So is a condition reserving the right by the vendor to repurchase the land when sold: *Hardy v. Galloway*, 111 N. C. 519, 32 Am. St. Rep. 828, 15 S. E. 890. Or a condition that if the grantee ever sells the land, it shall be to the grantor at a stipulated price: *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451. But see *Jackson v. Schutz*, 18 Johns. 174, 9 Am. Dec. 195. Or a condition that the grantee shall not convey without the consent of the grantor: *Murray v. Green*, 64 Cal. 363, 28 Pac. 118. See, also, *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908; *Durand v. Higgins* (Kan.), 72 Pac. 567; *Miller v. Denny*, 99 Ky. 53, 34 S. W. 1079. But a condition that the conveyance shall be void upon a failure to pay the purchase money is not void: *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621.

Conditions in partial restraint of alienation, as that the grantee shall not sell to a particular person or for a particular time, have been considered good: *Langdon v. Ingram*, 28 Ind. 360; *Fouts v. Milliken* (Ind. App.), 65 N. E. 1050; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Camp v. Cleary*, 76 Va. 140. However, in *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, a condition annexed



to a deed in fee, which forbids alienation by the grantee for a specified time is held void as inconsistent with the grant. A condition in a deed that the grantee shall sell to a certain person at a certain price is held valid in *Rice v. Hall*, 19 Ky. Law Rep. 814, 42 S. W. 99. An estate for life may be vested in a married woman with a provision in restraint of alienation: *Simonton v. White*, 93 Tex. 50, 77 Am. St. Rep. 824, 53 S. W. 339.

A provision in a deed, creating a servitude upon an estate and annexing it to another estate as an easement appurtenant to the latter, and declaring that the grantee shall not dispose of the easement separately from the property to which it is annexed, is not an objectionable restraint upon alienation: *Warren v. Syme*, 7 W. Va. 474.

**c. Revesting on Death of Grantee.**—Where property is conveyed in fee simple, upon condition, however, that whatever part of the premises of which the grantee may die seised, or in which she may at the time of her death retain an interest, “shall revert to, vest in, and again become the absolute and indefeasible property of the grantor,” the condition is inconsistent with the absolute conveyance and is inoperative: *Case v. Dwire*, 60 Iowa, 442, 15 N. W. 265.

**d. Restricting Right of Partition.**—It is said, in *Spaulding v. Woodward*, 53 N. H. 573, 16 Am. Rep. 392, that the right to partition may be waived by the parties in interest, who, by express condition or proviso, may restrain and inhibit the exclusive beneficial use and enjoyment of estates held in common or joint tenancy, to any extent short of an absolute restriction of alienation. But in *Hacussler v. Missouri Iron Co.*, 110 Mo. 188, 33 Am. St. Rep. 431, 19 S. W. 75, it is held that a stipulation in a deed conveying an undivided interest in land, whereby the parties covenant for themselves, their heirs, and assigns never to institute proceedings for the partition of a certain specified portion of that land, is an unreasonable restraint of the enjoyment and use of the property, and therefore void. A condition in a conveyance of land in undivided shares to the individual members of an association for the purpose of erecting and managing a hotel, that the land is to be held in common, without partition or division, subject to the articles of the association, is not invalid as repugnant to the estate granted, nor upon grounds of public policy: *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451.

**e. Sale of Sand from Premises.**—An agreement between grantor and grantee that the latter will not sell any sand off the premises conveyed will be enforced in equity, where it appears that the grantor exacted such agreement as a condition precedent to the conveyance, he being engaged in the business of selling sand from a tract of land of which the premises conveyed constituted but a small part: *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335. And if a town votes to sell a beach, a bond, intended

to preserve certain privileges, which is conditioned that the grantee shall allow the inhabitants of the town to take and carry away sand and gravel, does not confer a right without stint, and cannot be considered repugnant to the grant, on the ground that the beach may in time be destroyed by the inhabitants: *Middletown v. Newport Hospital*, 16 R. I. 319, 15 Atl. 800.

**f. Reserving Right to Revoke Grant.**—A condition in a deed that the grantor may revoke and annul the conveyance is not unlawful. Since the deed is notice to the grantee's creditors that the power of revocation is reserved, such a condition cannot be assailed on the ground that it is contrary to public policy in enabling the parties to the instrument to defeat the rights of such creditors: *Ricketts v. Louisville etc. Ry. Co.*, 91 Ky. 221, 24 Am. St. Rep. 176, 15 S. W. 182.

**g. Flow of Light and Air.**—A grantor may reserve a free flow of air and light over the premises conveyed: *Gay v. Walker*, 36 Me. 54, 58 Am. Dec. 734. See, also, *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503. Where one who has covenanted to convey land holds under a deed which provides that if any erections are made on the land which obstruct the view of a certain neighbor, the land shall be forfeited to the grantor for the neighbor's use, his estate is upon a condition which condition is valid, although in favor of a stranger, and his title is not perfect: *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785. And a condition in a deed that no windows shall be placed in the north wall of the house or of any house erected on the premises within thirty years, is valid: *Gray v. Blanchard*, 25 Mass. (8 Pick.) 284.

#### **h. Building Restrictions.**

**1. In General.**—Conditions, restrictions and covenants are frequently inserted in deeds restricting, at least for a certain period of time, the character, location, and use of the buildings that may be erected on the premises. The purpose of these is generally to prevent the erection of such buildings thereon as will impair the value of the residue of the land belonging to the grantor or conveyed to others. So long as the restriction is reasonable and in accord with public policy no valid objection to it is discernible. These restrictions assume various forms. Some of them are directed toward the height, material, or value of buildings that may be constructed on the land conveyed: See *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 856; *Hobson v. Cartwright*, 93 Ky. 368, 20 S. W. 281; *Keening v. Ayling*, 126 Mass. 404; *Frink v. Hughes* (Mich.), 94 N. W. 601; *Clark v. Martin*, 49 Pa. St. 289.

Others place limitations on the building line, requiring that no building shall be located less than a certain specified distance from the street or approach to within a certain distance of the boundary of the land: See *Ewertsen v. Gerstenberg*, 186 Ill. 344, 57 N. E. 1051; *Herrick v. Marshall*, 66 Me. 435; *Linzee v. Mixer*, 101 Mass.

512; *Attorney General v. Gardiner*, 117 Mass. 492; *Sanborn v. Rice*, 129 Mass. 387; *Nowell v. Boston Academy*, 130 Mass. 209; *Payson v. Burnham*, 141 Mass. 547, 6 N. E. 708; *Hamlen v. Werner*, 144 Mass. 396, 11 N. E. 684; *Attorney General v. Ayer*, 148 Mass. 584, 20 N. E. 451; *Attorney General v. Algonquin Club*, 153 Mass. 447, 27 N. E. 2; *Smith v. Bradley*, 154 Mass. 227, 28 N. E. 14; *In re Welsh*, 175 Mass. 68, 55 N. E. 1043; *Best v. Nagle (Mass.)*, 65 N. E. 842; *Suteliffe v. Eisele*, 62 N. J. Eq. 222, 50 Atl. 69. A piazza attached to a house, whether covered by its own roof or by an extension of the roof of the house, if it projects beyond the line prescribed, violates the restriction or condition against the construction of buildings nearer than a specified distance from the street: *Bagnall v. Davies*, 140 Mass. 76, 2 N. E. 786; *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. 854. So does a bay window, one story high and built up from the foundation wall: *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206. And a porch built upon brick foundations, roofed, and permanently attached to the whole front of the house: *Ogontz Land etc. Co. v. Johnson*, 168 Pa. St. 178, 31 Atl. 1008. Compare *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076; *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506.

Others forbid the erection of any other buildings on the land conveyed, except dwelling-houses and the necessary outbuildings: See *Duncan v. Central etc. Ry. Co.*, 85 Ky. 525, 4 S. W. 228; *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122; *Fuller v. Arms*, 45 Vt. 400. Such conditions or restrictions are violated by putting up a tent, fitted up with a stove and furniture, to be lived in in the daytime temporarily in the summer: *Blakemore v. Stanley*, 159 Mass. 6, 33 N. E. 689; or by using a portion of the building for a grocery or a meat and vegetable store: *Dorr v. Harrahan*, 101 Mass. 531, 3 Am. Rep. 398; *Cornish v. Wiessman*, 56 N. J. Eq. 610, 35 Atl. 408; or by converting a dwelling into a public eating-house: *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; or by carrying on a photograph gallery: *Frink v. Hughes (Mich.)*, 94 N. W. 601. And a condition that only one single dwelling-house shall be erected is broken by the erection of a building containing several tenements designed for separate families: *Gillis v. Bailey*, 17 N. H. 18, 21 N. H. 149. And a condition that no dwelling-house should contain more than two tenements, or be constructed for more than two families is broken by the erection of a building with capacity for three families: *Ivarson v. Mulvey*, 179 Mass. 141, 60 N. E. 477. A condition that the property shall be used for residence purposes only does not prohibit the building of an apartment house, with flats, each complete for housekeeping, but with a large dining-room for the use of such occupants as desire it instead of their private dining-rooms: *McMurty v. Phillips Investment Co.*, 19 Ky. Law Rep. 2021, 45 S. W. 96. If a building is maintained as a single dwelling-house, but is used also as a private institution for the treatment of persons suffering from the liquor and kindred habits, who are boarded and

lodged there during treatment, a restriction in the deed conveying the land, that no building other than one single dwelling-house shall be maintained on the lot, is not violated: *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768.

2. **Effect of Change in Neighborhood.**—When the conditions of cities greatly change, it is not for the interest of the community that restrictions put upon land in reference to the quiet of residential streets should continue, when the neighborhood is entirely given up to business, unless they are so expressed as plainly to be binding: *Boston Baptist Social Union v. Trustees of Boston University* (Mass.), 66 N. E. 714. If the purpose of restrictive covenants inserted in a conveyance is to make the locality a suitable one for residence, but owing to the general growth of the city and the present use of the whole neighborhood for business, this purpose can no longer be accomplished, no matter how rigidly the restriction is enforced, it is oppressive and inequitable to give effect to it, and equity will not enjoin its violation, though when there is no remedy at law the bill may be retained for the purpose of assessing damages: *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691. See, too, *Roth v. Jung*, 79 N. Y. Supp. 822, 79 App. Div. 1. Equity will refuse to enforce a covenant not to devote a certain property to business purposes where there has been such a change in the character of the neighborhood by the building of an elevated railway and the increase of business houses, as to defeat the object of the agreement, and render it inequitable to deprive the owner of the privilege of using his property as its surroundings required: *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365. And so where there is a covenant against the erection of cheap buildings, if conditions so change that only such buildings are suited to the vicinity, the covenant will not be enforced: *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11.

### III. Restrictions on Use of Property.

a. **In General—Offensive Businesses.**—Every owner of real property has the right to deal with it so as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the residue of the land which he retains or grants to others. The only restriction on this right is that it shall be exercised reasonably, with a due regard to public policy, and without creating an unlawful restraint on trade. Conditions and restrictions in deeds, inserted with a view to assert this right by forbidding the use of the property for objectionable trades, businesses, and purposes, are valid: See *Whitney v. Union Ry. Co.*, 11 Gray. 359, 71 Am. Dec. 715; *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936; *Fink v. Hughes* (Mich.), 94 N. W. 601; *Winnepesaukee Camp-meeting Assn. v. Gordon*, 63 N. H. 505, 3 Atl. 426; *United States v. Certain Lands in Jamestown*, 112 Fed. 622.



A restriction that property shall not be used for manufacturing nor any nauseous or offensive business is not contrary to public policy, nor an unreasonable restraint of trade: *Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556. But the sale of groceries and provisions is not a nauseous or offensive trade: *Tobey v. Moore*, 130 Mass. 448. A prohibition of the use of property granted inconsistent with the title conveyed is void: *Craig v. Wells*, 11 N. Y. 315.

b. **Sale of Liquors.**—A condition in a deed against the manufacture, sale or gift of intoxicating liquor on the premises conveyed, whether general and for all time or limited to particular sales for a specified time, is valid. It is not repugnant to the grant, nor against public policy, nor in restraint of trade: *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *Hatcher v. Andrews*, 68 Ky. (5 Bush) 561; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363; *Reilly v. Otto*, 108 Mich. 330, 66 N. W. 228; *Plumb v. Tubbs*, 41 N. Y. 442; *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911; *Bad River Lumbering etc. Co. v. Kaiser*, 82 Wis. 166, 51 N. W. 1100; *Cowell v. Springs Co.*, 100 U. S. 55, affirming 3 Colo. 82. The condition will not be presumed to be a nominal condition and disregarded, although a statute of the state declares that when any conditions annexed to a conveyance are merely nominal and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be disregarded: *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554, 51 N. W. 905. It has been held otherwise, however, when it appears that the grantor does not reside, or own other property, in the same village or in its vicinity: *Barrie v. Smith*, 47 Mich. 130, 10 N. W. 168.

But such conditions will not be enforced when inserted for a dishonest purpose, and to enable the grantor to obtain a monopoly of the prohibited business: *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 13 Am. St. Rep. 420, 42 N. W. 532. And when a grantor conveys one parcel of land with the condition in the deed, but afterward conveys adjoining land to third persons without it, he waives the right to enforce the restrictions contained in the first deed, even though they were omitted from the second deed by mistake, if no proceeding to correct the mistake has been taken: *Jenks v. Pawlowski*, 98 Mich. 110, 39 Am. St. Rep. 522, 56 N. W. 1105. But see *Haines v. Einwachter* (N. J. Eq.), 55 Atl. 38.

If a change in the character of the neighborhood is relied on to prevent the enforcement of a restriction against the sale of liquor, there must be such a change, so it is held, caused by the grantor or those claiming under him, as to defeat the purpose of the restrictions or seriously to injure the property rights of the grantee if enforced: *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145.

A restriction in a deed as to the sale of intoxicating liquors on the premises is effective against a tenant, assignee, or purchaser of the vendee: *O'Brien v. Wetherell*, 14 Kan. 616; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554, 51 N. W. 905.

**c. Hotels and Public-Houses.**—A condition or stipulation in a deed that the premises shall not be used for a hotel, tavern, or public-house is valid: *Post v. Bernheimer*, 31 Hun, 247; *Stines v. Dorman*, 25 Ohio St. 580. In the last case, the use was forbidden so long as certain other property of the grantor should be used for that purpose. In *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809, 22 N. E. 145, it is held that though a deed contains the clause: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public-house of any kind," this condition will not be construed as a condition subsequent, the failure to observe which will forfeit the estate, but as a mere covenant for the protection of the interests of the grantor. The office of the clause is merely to restrain the generality of preceding clauses by limiting the uses to which the premises may be put.

**d. Railways and Stations.**—A condition in a grant to a railroad company against establishing a station within a certain distance, so as to disable itself to perform its duty by establishing a station where the public convenience may require, is void: *St. Louis etc. R. R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122. See, also, *Tucker v. Allen*, 16 Kan. 312. But a condition or covenant in the conveyance of a right of way to stop all accommodation trains at a depot to be erected at a certain place, cannot be held, as a matter of law, to be void, as contravening the public interest: *Gray v. Chicago etc. Ry. Co.*, 189 Ill. 400, 59 N. E. 950. A condition in a grant that a railway shall be maintained upon the estate is valid: *Cornelius v. Ivens*, 26 N. J. L. 376. And a condition in a deed to a railroad company that certain portions of the land shall be kept open as public streets is not void as imposing a duty inconsistent with the corporation's business and outside the object for which it was formed: *Tinkham v. Erie Ry. Co.*, 53 Barb. 393.

**e. Mills and Warehouses.**—A grantor may impose the condition that the grantee shall keep a sawmill and a gristmill doing business on the premises: *Sperry v. Pond*, 5 Ohio, 387, 24 Am. Dec. 296. See, too, *Houston etc. R. R. Co. v. Ennis-Calvert Compress Co.*, 23 Tex. Civ. App. 441, 56 S. W. 367. And, on the other hand, as is held in the principal case, a condition in a deed that no grain elevator shall ever be erected on four village lots conveyed or grain ever handled thereon, is valid and enforceable, notwithstanding the building erected is a public warehouse, there being no such warehouse

on the premises when conveyed and the condition not affecting all the available lands in the community.

**f. Public Buildings—Courthouse.**—A condition in a deed to a municipality that the property shall be used for the purpose of public buildings, such as a courthouse, or that such buildings shall be erected on the premises within a certain time is valid: *Henry v. Etowah County*, 77 Ala. 538; *Trustees of Union College v. New York*, 173 N. Y. 38, 93 Am. St. Rep. 569, 65 N. E. 853. And it is violated if, after the courthouse is erected and has been used for some time, the county seat is removed to another town: *Pepin County v. Prindle*, 61 Wis. 301, 21 N. W. 254.

**g. Schools, Churches, Cemeteries, etc.**—An owner of property may convey it on the condition that it shall be used solely for the purpose of erecting school or educational buildings thereon: *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10; *Warner v. Bennett*, 31 Conn. 468; *McKissick v. Pickle*, 16 Pa. St. 140. Or that it shall be used only for church or religious purposes: *Grissom v. Hill*, 17 Ark. 483; *Upington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359; *First Presbyterian Church v. Elliott (S. C.)*, 43 S. E. 674, or only by a particular denomination: *Nelson v. Solomon*, 112 Ga. 188, 37 S. E. 404; or that, when not used by the sect to which it is granted, the building shall be open to all evangelical orders of Christians: *Tomlin v. Blunt*, 31 Ill. App. 234.

On the other hand, it is said that the owner of property may convey it on the condition that it shall not be used for a school-house, a hospital, or a cemetery: *Plumb v. Tubbs*, 41 N. Y. 442, 446; *McKissick v. Pickle*, 16 Pa. St. 140.

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## CHICAGO AND ALTON RAILROAD COMPANY v. GORE.

[202 Ill. 188, 66 N. E. 1063.]

**RAILROADS.**—An Attempt to Step upon a Moving Train in compliance with the advice or direction of the conductor cannot be declared, as a matter of law, to be negligence that will bar a recovery for injuries sustained, unless the danger is so open and obvious that only a reckless man would encounter it. (p. 226.)

**RAILROADS.**—Every Attempt to Board a Train in Motion is not, per se, contributory negligence. Whether or not it is, is a question of fact to be determined in view of all the attendant and surrounding circumstances. (pp. 226, 228.)

**RAILROADS.**—It is Within the Scope of a Conductor's Duty to advise and direct passengers in the matter of boarding trains and in getting off at stations to secure their baggage to be rechecked. (p. 226.)

**RAILROADS—Boarding Train in Motion—Evidence.**—A conversation between the conductor and a passenger with reference to the course to be pursued by the latter in getting off the train at a station to have his baggage rechecked is admissible as evidence in an action for injuries sustained by him while trying to reboard the moving train. (p. 227.)

**RAILROADS—Boarding Train in Motion.—Testimony** by one injured in attempting to board a moving train that he heard the words, "Hurry up! Get on there!" is admissible, although he is unable to say they were spoken by the conductor, if such fact is shown by other testimony. (p. 227.)

**RAILROADS—Boarding Train in Motion on Conductor's Advice.**—The fact that a person injured in boarding a moving train acted upon the suggestion, advice, or direction of the conductor is competent as tending to prove that he exercised reasonable care. (p. 227.)

**RAILROADS—Boarding Train in Motion.—A Special Interrogatory,** Did the plaintiff attempt to board the train of the defendant after it was in motion, and if so, was such attempt the cause of the injury to the plaintiff?" should be modified by inserting the word "proximate" before the word "cause." (pp. 227, 228.)

**TRIAL.—Special Interrogatories Should Call** for a finding as to ultimate controlling facts, or as to probative facts from which the ultimate controlling facts necessarily result. (p. 228.)

**TRIAL.—Special Interrogatories.—It is Competent for an Attorney** to read special interrogatories to the jury, to discuss the evidence applicable thereto, and to suggest the answers which, in his view, should be returned. (pp. 228, 229.)

Patton & Patton and William Brown, for the appellant.

Bell & Burton, for the appellee.

**191** **BOGGS, J.** The appellate court for the third district affirmed the judgment in favor of the appellee entered in the Macoupin circuit court, in the sum of five thousand three hundred and four dollars, in an action on the case against the appellant company to recover for personal injuries inflicted, as the declarations alleged, through the negligence of the servants of the company. This is an appeal to reverse the judgment of affirmance.

In September, 1899, the appellee desired to go from Chicago to Carlinville on the appellant's railroad. The State Fair was then in progress in Springfield and the appellant company was selling tickets at reduced rates to that city. Appellee purchased a ticket from Chicago to Springfield and had his baggage checked to the latter point. When on the train he surrendered his ticket to the conductor and paid that official the fare charged by the company for passage from Springfield to Carlinville. He desired to have his baggage rechecked, so that it would also be trans-



ported to Carlinville. He requested the conductor to make this change in the destination of his baggage, and was told by the conductor to attend to it himself. He asked the conductor where he could attend to the matter, and was told that he could do so when the train stopped at Joliet, and in reply to a question asked by the appellee, the conductor said there would be time for him to have his baggage rechecked at Joliet. When the train arrived at Joliet the appellee went upon the platform and forward to the baggage-car, <sup>192</sup> and after some delay succeeded in getting his baggage rechecked from Springfield to Carlinville. The evidence tended to show that he proceeded with no unnecessary delay in the matter of getting his baggage rechecked and in seeking to re-enter the car, but that through the negligence of the conductor the train was put in motion and was moving when he attempted to mount the steps of the car. The evidence also tended to show that the conductor, who was still upon the platform encouraged and advised appellee to attempt to board the train; that he supposed he might do so with safety and attempted to reach the steps, and in doing so fell or was thrown or drawn under the wheels of the car and his right foot so mangled and crushed that it had to be amputated.

It is so far within the scope of the authority of a conductor of a railway train to advise and direct passengers in the matter of boarding the train, that an attempt to step on a moving train in compliance with such advice or direction cannot be declared, as matter of law, to be negligence that will bar recovery, unless the danger is so open and obvious that only a reckless man would encounter it: 5 Am. & Eng. Ency. of Law, 2d ed., 653; 2 Rapalje & Mack's Digest of Railway Law, par. 370. In *Chicago etc. R. R. Co. v. Winters*, 175 Ill. 293, 302, 51 N. E. 901, 904, we said: "The directions, invitation or assurance of safety given by a servant of the company may so qualify a plaintiff's acts as to relieve it of the quality of negligence which it would otherwise have." The law has no rule declaring every attempt to board a moving train to be, per se, negligence. Whether or not the appellee, in attempting to get upon the car while the same was in motion, on the occasion in question, was guilty of such contributory negligence as would bar a recovery, was a question of fact to be determined by the jury in view of all the attendant and surrounding circumstances: *Chicago etc. R. R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578; *Chicago etc. R. R. v. Stornment*, 190 Ill. 42, 60 N. E. 104, 5 Am. <sup>193</sup> & Eng.

Ency. of Law, 2d ed., 653, 656, 657; 3 Thompson on Negligence, secs. 2995, 2996.

The trial court did not err in permitting the appellee to detail the conversation which occurred between himself and the conductor while on board the train with reference to the course to be pursued by the appellee, when the train should arrive at Joliet, in the matter of procuring his baggage to be rechecked from Springfield to Carlinville. It was within the scope of the duty of the conductor to make such suggestions and give advice to passengers, and the conversation referred to explained why the appellee left the car and came upon the platform at Joliet, and tended to relieve him from any charge of apparent negligence in leaving the car and to justify him in so doing.

We have examined the complaint that the appellee was allowed to testify that just as or immediately before he attempted to remount the step of the car he heard the words, "Hurry up! Get on there!" without being able to testify that such words were spoken by the conductor. The appellee testified he did not see the person who so cried out, but that he had only a moment before left the conductor at the place from which the voice came, and that no one else was there with the conductor. This evidence tended to the identification of the conductor as the person who so called out, and that the conductor was such person was removed from question by the testimony of the witness Cowing. The declaration alleged that the appellee proceeded with reasonable and ordinary care in attempting to board the train, and that he acted upon the suggestion, advice or direction of the conductor was competent to be proven as a circumstance tending to show the appellee had exercised ordinary care.

The appellant company asked the court to submit the following special interrogatory (except the word "proximate," inclosed in brackets) to the jury: "Did the plaintiff attempt to board the train of the defendant after it <sup>194</sup> was in motion, and if so, was such attempt the [proximate] cause of the injury to the plaintiff?" The court modified the interrogatory by inserting the word "proximate," and this action of the court is assigned as for error. This interrogatory was framed by counsel for the appellant company upon the theory that the law pronounced an attempt to board a train while in motion as, per se, contributory negligence. If that view of the law had been correct, then an affirmative answer to the interrogatory would have been inconsistent with a general verdict for the plaintiff; but, as

we have seen, it was not a question of law, but of fact, whether the act of the appellee in attempting to get upon the train while the same was in motion was, under the circumstances, negligence. Whether negligent or not was to be determined upon consideration of all the attending facts and circumstances. Hence an affirmative answer to the interrogatory as framed by counsel for the appellant and as modified by the court would not have established an ultimate fact decisive, in any manner, of the issues in the case. That the train was in motion when the appellee attempted to enter the car is not at all inconsistent with the general verdict returned by the jury for the appellee. Special interrogatories should call for a finding as to ultimate controlling facts, or as to probative facts from which the ultimate controlling facts necessarily result: *Chicago etc. Ry. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. The special interrogatory as asked or as modified did not call for the finding of an ultimate fact, or for a probative fact from which an ultimate fact resulted, and consequently should have been refused. The appellant, therefore, has no ground to complain that it was modified.

We do not conceive that it was improper practice to permit counsel for appellee to read the special interrogatories to the jury, and in connection therewith discuss the evidence, for the purpose of convincing the jury that under the evidence the interrogatories should be answered <sup>195</sup> in the affirmative or in the negative, as the case might be. The objection is not that the argument of counsel appealed to the prejudice of the jurors or to their sympathies, or that it transcended legitimate grounds of debate, but simply that it was error to allow counsel to read the interrogatories to the jury and discuss the evidence which bore upon the answers which counsel conceived should be made by the jury thereto. The statute which authorizes the submission of special questions of fact to be answered by a jury requires that such questions shall be stated to the jury in writing, and "shall be submitted by the party requesting the same, to the adverse party before the commencement of the argument to the jury." The end designed to be attained by the argument of counsel is to lead the jury to the proper decision of or answer to the issues made by the pleadings. It was entirely legitimate for counsel to review the evidence and suggest to the jury what, under the proof, their general verdict should be, and none the less to suggest the answers which, in the view of counsel, the evidence

demand should be returned to the special interrogatories. In *Timins v. Chicago etc. R. R. Co.*, 72 Iowa, 94, 33 N. W. 379, it was said: "It is competent for an attorney to read special interrogatories to the jury, and to discuss the evidence applicable thereto, and to suggest the answers which in his judgment ought to be rendered."

The objection to the first, second and third instructions given in behalf of the appellee, that they submitted to the jury, to be decided as a question of fact, whether the appellee was guilty of contributory negligence in attempting to board the train while the same was in motion, is based upon the insistence of the appellant, already disposed of, that such act constituted negligence in point of law.

It is further objected that the second of said instructions assumed that the acts of the conductor at the time in question were negligent. We do not so read the instruction. <sup>196</sup> The only reference in the instruction to the defendant or its agents in charge of the train of cars is, that "if in this case the jury believe, from the evidence, that the plaintiff, while using such reasonable care for his own safety, was injured in the manner as charged in the declaration, and that such injury was occasioned by the negligence of the defendant or of its agents in charge of the train of cars mentioned in the evidence, and as charged in the declaration, then the jury should find the defendant guilty." Nothing is assumed by this instruction, but the jury were left entirely free to determine all charges of negligence from a consideration of the evidence.

Instructions 10, 18 and 19, asked by the appellant company, sought to have the court direct the jury that the conversation between the appellee and the conductor while on the train, before reaching Joliet, with reference to the opportunity which would be presented to the appellee, while the train was at Joliet, to arrange to have his baggage rechecked so that it would be carried from Springfield to Carlinville, was not competent for consideration. In the view we have expressed as to this conversation it follows these instructions were properly refused.

The other refused instructions incorporated the principle sought to be maintained by the appellant company, that the attempt on the part of the appellee to enter the train while it was in motion conclusively established that he was guilty of negligence, and were for that reason properly refused.



The alleged error in the denial of the motion in arrest of judgment involved no question not already considered.

The judgment of the appellate court must be, and is, affirmed.

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*An Attempt to Enter a Moving Car* is not, per se, contributory negligence: *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11, 9 Am. St. Rep. 387, 13 Atl. 387. But see *Weeks v. New Orleans etc. R. R. Co.*, 40 La. Ann. 800, 8 Am. St. Rep. 560, 5 South. 72; *Hunter v. Coopers-town etc. R. R. Co.*, 112 N. Y. 371, 8 Am. St. Rep. 752, 19 N. E. 820; *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827.

*The Conductor of a Railroad Train*, in directing a passenger as to the method of getting on the train, is acting within the scope of his authority, and the passenger, in complying with his directions, is not guilty of negligence, unless he exposes himself to plain and apparent danger: *Irish v. Northern Pac. R. R. Co.*, 4 Wash. 48, 31 Am. St. Rep. 899, 29 Pac. 845. The general rule is, that obedience by a passenger to the directions of a conductor, given within the scope of his authority, where such obedience will not expose the passenger to known or apparent danger which a prudent man would not incur, is not contributory negligence: *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26, 2 Am. St. Rep. 144, 13 N. E. 122, 14 N. E. 352.

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## PEOPLE v. BARRETT.

[202 Ill. 287, 67 N. E. 23.]

**CRIMINAL LAW—Suspending Sentence.**—A court may delay pronouncing judgment in a criminal case for a reasonable time to hear and determine motions for a new trial or in arrest of judgment, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes; but it cannot suspend indefinitely the pronouncing of sentence or the execution of judgment. (p. 232.)

**A RECOGNIZANCE is an Obligation** entered into before a court of record or magistrate, with a condition to do some particular act, as to keep the peace or appear and answer to a criminal accusation. (p. 238.)

**A RECOGNIZANCE Differs from a Bail Bond** merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation. (p. 238.)

**CRIMINAL LAW—Delay in Sentence.**—An unexplained delay intervening between the release of a person convicted of crime on his own recognizance while his motion for a new trial is pending, and the final disposition of that motion and his remandment to custody, deprives the court of jurisdiction to pronounce sentence. That the delay was with his consent is immaterial. (pp. 232, 239.)

**CRIMINAL LAW—Release on Parole.**—Trial courts cannot suspend indefinitely the sentence of one convicted of crime, and permit him to go at large upon his own recognizance or upon parole. (p. 240.)

**CRIMINAL LAW—Discretion of Court.—The Rendering of Judgment** and final sentence cannot be made a mere matter of discretion with the judge or the public prosecutor, nor to depend upon the subsequent conduct of the convicted person. (p. 240.)

Habeas corpus directed to Thomas E. Barrett, sheriff. The relator, Anton Boenert, was indicted in the criminal court of Cook county at the June term, 1898, for larceny and embezzlement, and on entering into a recognizance of one thousand dollars, with two sureties, for his appearance, was released from custody. Afterward, at the April term, 1900, the relator was tried by a jury and found guilty of grand larceny, April 12, 1900. He immediately moved for a new trial and was remanded into custody. On May 5, 1900, being the last day of the April term, on motion of the relator the motion for a new trial was continued, and he was recognized, without sureties, in the sum of five hundred dollars, to appear before the criminal court of Cook county on May 7, 1900, and from day to day and from term to term, and from day to day of each term, until the final sentence or order of the court, to answer upon the indictment pending, and he was on his own recognizance released from custody. The next record in the case is of the October term, 1902. On October 31, 1902, the same judge before whom the relator was tried and convicted and who allowed him to depart on his own recognizance overruled his motion for a new trial. Relator then moved in arrest of judgment, and this motion was continued to November 5, 1902, and he was remanded. The motion was finally overruled November 11th and relator sentenced to imprisonment in the penitentiary. He immediately applied to the circuit court for a writ of habeas corpus. His petition being dismissed, he applied to this court.

Joseph B. David, for the relator.

Charles S. Deneen, state's attorney, and F. L. Barnett, for the respondent.

**259** CARTER, J. It is strenuously urged, for the relator, that the long interval of two years and five months that intervened between his release on his own recognizance while his motion for a new trial was pending, and the final disposition of that motion and his remandment to custody, which was followed nearly a month later by a sentence to the penitentiary, was tantamount to an abandonment of the proceeding and a release from further im-

prisonment, and that the court thereby lost jurisdiction to enter up a judgment on the verdict.

At common law, upon every conviction in the court of king's bench of a crime, capital or not capital, whether by verdict or confession, the party had four days to move <sup>290</sup> in arrest of judgment if there were so many days remaining of the term, and if not, then the longest time that could be had in the term: 2 Hawkins' Pleas of the Crown, c. 48. The power of granting a respite belongs, of common right, to every tribunal which is invested with authority to award execution, but it is commonly granted where the defendant pleads a pardon, which, though defective in point of form, sufficiently manifests the intention of the crown to remit the sentence, where it seems doubtful whether the offense is not included in some general act of grace, or whether it amounts to so high a crime as that charged in the indictment. The judge sometimes also allows it before judgment, or at least intimates his intention to do so, as when he is not satisfied with the verdict and entertains doubt as to the prisoner's guilt, or when a doubt arises, if the crime be not within clergy, or when, from some favorable circumstances, he intends to recommend the prisoner to mercy: 1 Chitty on Criminal Law, 758; 2 Hawkins' Pleas of the Crown, c. 51, sec. 8; 2 Hale's Pleas of the Crown, c. 58, p. 412. "If the judge thinks it proper to reprieve a capital convict, he sends a memorial or certificate to the king's most excellent majesty, directed to the secretary of state's office, stating that, from favorable circumstances appearing at the trial, he recommends him to his majesty's mercy and to a pardon, upon condition of transportation or some slight punishment. The recommendation is always attended to": Christian's note to 4 Blackstone's Commentaries, \*404.

There can be no doubt that a court has the right, in a criminal cause, to delay pronouncing judgment for a reasonable time, for the purpose of hearing and determining motions for a new trial or in arrest of judgment, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes; but to suspend indefinitely the pronouncing of the sentence after conviction, or to suspend indefinitely the execution of the judgment after sentence pronounced, is not within the power of the <sup>291</sup> court. To allow such a power would place the criminal at the caprice of the judge. If the judge can delay the sentence one year he could delay it for fifteen years, or any

length of time. In *United States v. Wilson*, 46 Fed. 748, the defendant pleaded guilty to adultery, and upon his promise to obey the laws upon that subject it was "ordered that the sentence be suspended and until further orders of this court, and that said defendant be released and his bail exonerated." Two years later the order was revoked and he was sentenced. The court held that the entry of the first order was error; that it was beyond the power of the court to suspend sentence for an indefinite time, and that the court could not correct such error at another term.

In *People v. Blackburn*, 6 Utah, 347, 23 Pac. 759, one Dodds was found guilty of voluntary manslaughter, and on his motion, by an order entered reciting that good and sufficient reasons were made to appear therefor, sentence was suspended during good behavior. Blackburn, the successor of the judge who entered this order, refused to fix a time to pronounce judgment. On a proceeding for a mandate to the judge the court said: "It is the duty of the court to keep control of the case and within a reasonable time to proceed to give judgment, and in doing so to exercise such discretion as the statute governing the particular offense commits to the court. The authority to wholly relieve parties from a conviction for crime is not given to the courts but belong to the pardoning power." The court held that the court below had determined to inflict the lightest penalty, and that being purely nominal, he had refused to pass sentence at all: See, also, *In re Flint* (Utah), 71 Pac. 531.

In *Weaver v. People*, 33 Mich. 295, the defendant pleaded guilty, sentence was suspended until the next term, and he was allowed to go on his own recognizance. Nothing further was done for two years and six months, when he was sentenced. The court said: "Sentence may be suspended <sup>292</sup> for various purposes. It may be for the purpose of allowing steps to be taken for an new trial or other relief, or it may be with a view of letting the offender go without punishment. The release of a defendant on his own recognizance and without sureties, in a merely nominal amount, signifies, usually, the latter purpose. It at least is a plain assertion of the judge that he did not regard the offense as one that should receive a severe punishment. The failure to take steps during the October term of 1874 was a practical abandonment of the prosecution, and corroborates the opinion that such must have been understood as the object of the suspension, and as the record stands it is fairly to be in-



ferred it was intentional." And in that case the judgment was reversed and the defendant discharged, but in the subsequent case of *People v. Reilly*, 53 Mich. 260, 18 N. W. 849, the same court appears to have been equally divided as to the power to suspend sentence. In this case Reilly was convicted of robbery October 22, 1881, and moved for a new trial, but on February 10, 1882, sentence was indefinitely suspended and he was admitted to bail on his own recognizance in the sum of five hundred dollars, to appear in court February 14, 1882, and from day to day and from term to term, then and there to receive the sentence of the court. February 14th the motion for a new trial was denied. About seven months afterward he was arrested on another charge but was not tried, and on November 28, 1882, he was sentenced to imprisonment for five years. Sherwood, J., said: "Under the third assignment of error the respondent's counsel claim that the suspension of sentence was so long that the court lost jurisdiction to make the sentence he did. Under our practice courts may, for good cause, suspend sentence a reasonable length of time after trial and conviction." Champlin, J., said: "I do not think it is competent for a circuit judge or other judicial officer to suspend indefinitely the sentence which the law makes it his duty to impose upon a person duly convicted or who <sup>293</sup> may plead guilty in his court. The effect of suspending sentence operates as a quasi pardon. It relieves the offender, for the time being, from the punishment which the law has prescribed shall be inflicted. The pardoning power, under our constitution, is reposed in the governor, and not in the judges. . . . The constitution having vested his power in the governor, it cannot be exercised by the circuit judge indirectly by letting the prisoner to bail on recognizance to appear when required, to receive sentence. A stay of sentence may be granted when a certiorari is sued out or when a writ of error is obtained for the purpose of review by the higher courts. Temporary stay may also be granted where steps are taken for a new trial; but all these are steps in the progress of the case, taken for the purpose of bringing about a change in the result. . . . It appears that over a year elapsed after Reilly was convicted of the crime of larceny from the person before he was sentenced. During a large portion of the time he had been suffered to go at large upon his own recognizance. If the judge entertained serious doubts of his guilt he should have recommended the governor to pardon

the respondent, and if he entertained no serious doubts of his guilt he should have pronounced judgment, instead of setting the criminal at large on his own recognizance. If such power can be exercised by a judge, it incorporates into our administration of the criminal law the ticket-of-leave system of the English judicature without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay sentence one year I do not see why he may not fifteen years. An exercise of such power in this age would be no less revolting to our sense of justice than was the exercise of such power in the reign of James I, when he sent Sir Walter Raleigh to the block fifteen years after his conviction." Campbell, J., said: "I think the court lost all power to sentence the respondent <sup>294</sup> by the discharge, on his own recognizance, for so long a period, and that the sentence cannot be sustained without practically overruling our previous holdings."

In a still later case (*People v. Brown*, 54 Mich. 15, 19 N. W. 571), Chief Justice Cooley delivering the opinion, in commenting upon a petition to the judge of the lower court to suspend sentence, said: The petitioners "formally request the judge himself, a high state official and the chief conservator of law and public order in that part of the state, to grasp at power not confided to him and usurp authority in the interest of a doubly convicted offender. That there may be no misapprehension on this point, it is only necessary to understand exactly what it was the judge was requested to do. In terms it was to suspend sentence. Now, it is no doubt competent for a criminal court, after conviction, to stay for a time its sentence, and many good reasons may be suggested for doing so, such as to give opportunity for a motion for a new trial, or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be (*Commonwealth v. Dowdican's Bail*, 115 Mass. 133); but it was not a suspension of judgment of this sort that was requested or desired in this case. . . . This judge would be usurping the functions of the executive were he to assume to give total immunity from punishment. No doubt judges have done this sometimes, under the pressure of such influence as appears here, but this is no reason for asking a repetition of the wrong. It is rather a reason for being specially careful and particular not to invite it, lest by and by it come to be understood that the power to pardon, instead of being limited

to one tribunal, is confided to many." With these views expressed by the Michigan judges we are disposed, in the main, to agree: See, also, *People v. Kennedy*, 58 Mich. 373, 25 N. W. 318.

The foregoing cases are quoted with approval by the supreme court of Georgia in *Neal v. State*, 104 Ga. 509, 69 Am. St. Rep. 175, 30 S. E. 858, where the court say: "The power to indefinitely postpone <sup>295</sup> the punishment prescribed by the law, whether exercised by suspending the imposition or by suspending the execution of a sentence, is the power to perpetually prevent punishment—a power which, under such provisions as are found in the constitution of this state, does not exist in the courts." In *In re Markuson*, 5 N. Dak. 180, 64 N. W. 939, the court said that at common law no stay after conviction could be obtained. In *People v. Morrisette*, 20 How. Pr. 118, the court used the following language: "I am of the opinion the court does not possess the power to suspend sentence indefinitely in any case. . . . An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner be discharged from imprisonment. No court in the state has any pardoning power. That power is vested exclusively in the governor." This case was practically overruled by the court of appeals in *People v. Court of Sessions of Monroe County*, 141 N. Y. 288, 26 N. E. 386, where the court said: "Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend a sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts and numerous adjudged cases." In New York there was a special statute authorizing the court to suspend sentence, but the court held that this power existed at common law, independently of the statute, and that it simply postponed the judgment temporarily or indefinitely, and did not encroach upon the power of the executive to grant reprieves or pardons; that the court may suspend sentence as before, but that it can do nothing to preclude itself from passing a proper sentence whenever such a course appears to be proper.

In Massachusetts it has long been the practice—and such practice is now recognized by statute—after a verdict of guilty in a criminal case, when the court is satisfied that by reason of extenuating circumstances or of the pendency of a question of law in a like case before <sup>296</sup> a higher court, or other sufficient

cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be "laid on file." Such order is not a final judgment, or a discontinuance, by which the case is put out of court, but a mere suspension of sentence, and the defendant may be brought in and sentenced at any subsequent period: *Thatcher's Criminal Cases*, 267; *Commonwealth v. Dowdican's Bail*, 115 Mass. 133. This practice was approved in *New Hampshire in Sylvester v. State*, 65 N. H. 193, 20 Atl. 954.

In *State v. Crook*, 115 N. C. 760, 20 S. E. 513, the court said: "The practice of making an order, where defendants are convicted or submit on a criminal charge, that the judgment be suspended upon the payment of the costs is one that seems to be somewhat peculiar to our own courts. . . . We search in vain for direct authority emanating from the courts of other states to aid us in determining the precise meaning of such orders, because it has not been the practice to make them elsewhere in the same way."

The court in *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547, said that "the practice of suspending sentence after conviction of crime is, under some circumstances, justifiable." Suspension of sentence, and subsequent arrest and imposition of sentence, have also been approved in *Gibson v. State*, 68 Miss. 241, 8 South. 329, *People v. Patrick*, 118 Cal. 332, 50 Pac. 425, and *Ex parte Williams*, 26 Fla. 310, 8 South. 425.

In *People v. Allen*, 155 Ill. 61, 39 N. E. 568, the relator pleaded guilty to the charge, but judgment upon his plea was stayed and he was allowed by the court to depart therefrom without recognizance, to appear again for sentence or any other purpose. More than three years afterward the case was stricken from the docket. At the next term it was reinstated and the relator sentenced to the penitentiary. It was held, after a review of the authorities, that it was the duty of the courts, in criminal cases, "upon <sup>297</sup> a conviction or plea of guilty, to pronounce judgment at that time, unless, upon motion for new trial, in arrest of judgment, or for other cause, the case is continued for further adjudication, and the defendant, by recognizance or being held in custody, required to continue to answer the charge, and if they fail to perform that duty but discharge the prisoner or permit him to go indefinitely, their power and



jurisdiction over him cease and a subsequent sentence is without judicial authority." In the case a bar the relator moved for a new trial, and on his motion the cause was continued to the next term, which began the second day following. Nothing further was done in the matter for two years and five months. He had been at large on a recognizance in the sum of one thousand dollars, with two sureties, before his trial, and after conviction stood committed until the day his motion for a new trial was continued to the next term. At that time he was permitted to depart from the court on his own recognizance. The law makes no provision for one accused or convicted of crime to go at large on his own recognizance. A recognizance at common law was an obligation entered into before some court of record or magistrate duly authorized, with a condition to do some particular act, as to keep the peace or appear and answer to a criminal accusation. It was not signed by the party entering into it: *Shattuck v. People*, 4 Scam. 477; 2 Blackstone's Commentaries, 341. A recognizance differs from a bail bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation: 3 Am. & Eng. Ency. of Law, 2d ed., 687. Our criminal code provides for the letting to bail of persons accused of crimes, and provides in section 7 of division 3, that "each of the bail shall be worth the amount of bail expressed in the recognizance over and above the amount exempt from execution. but the court, judge, justice of the peace or officer, <sup>298</sup> in taking bail, may allow more than two bail to justify severally in amounts less than that expressed in the recognizance, if the whole qualification be equivalent to two sufficient bail." It also provides for the surrender of the principal by his bail.

If two sufficient sureties are required of a person merely accused of crime, it would seem that nothing less ought to be required of one convicted of crime. The very nature of bail requires sureties. It is a delivery or bailment of a person to his sureties upon their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail: 4 Blackstone's Commentaries, 297; 1 Bishop on New Criminal Procedure, sec. 248. See, also, *Smart v. Cason*, 50 Ill. 195. The sureties can always exonerate themselves by surrendering the principal. If one is allowed his liberty on his own recognizance there is no

surety bound to secure his appearance at court. He is in the custody of no one who can surrender him to the sheriff. As said in *Weaver v. People*, 33 Mich. 295, the release of a defendant on his own recognizance and without sureties usually signifies that the offender is to go without punishment. No other construction would naturally be put on such an undertaking by the person so released from custody. It is true, there was in the case of the relator a motion for a new trial pending, which was continued to the next term, but nothing was done in the matter, although numerous terms intervened, for twenty-nine months. We are of the opinion that this was an unreasonable and unwarrantable delay, it being entirely unexplained by anything in the record, and that the court, in view of all the circumstances, including the omission to require security for the relator's appearance, lost jurisdiction of the case, and that the subsequent sentence was without judicial authority: *People v. Allen*, 155 Ill. 61, 39 N. E. 568.

Whatever may have been the practice at common law, or whatever may be the practice in other states of this <sup>299</sup> country, in regard to the suspending of sentence for the purpose of giving the accused a chance to reform, and thus virtually reprieving him, the legislature of this state has adopted a different method to give persons convicted of crimes the opportunity to reform, by providing a system of parole and boards to administer the same, and in view of the expressed policy of the legislation of this state we are disposed to hold that the trial courts do not have the power to suspend the imposition of the sentence indefinitely after conviction, or to do such acts that virtually amount to an indefinite suspension of sentence, or to release the prisoner on parole. As said in *People v. Allen*, 155 Ill. 61, 39 N. E. 568: "If such power remained in the court three years it would continue indefinitely and might be exercised at any future time, and that, too, without any reason for doing so except such as might exist in the mind of the judge causing the rearrest and pronouncing judgment. . . . The state has a right to demand and the welfare of society requires, that those who are convicted or plead guilty to violations of the law shall be promptly and certainly punished."

Long and unreasonable delays in passing upon motions for new trials or in arrest of judgment are calculated to obstruct the administration of public justice and to operate as a denial of the

right of the citizen to a speedy trial. It is said, however, in this case, that all the delay was with the consent of the relator, and that he cannot now be heard to complain. It cannot, of course, be contended that the doctrine of estoppel has any application here, nor can it be held that the relator could waive any requirement respecting the jurisdiction of the court to enter judgment and pronounce the sentence. If the court had no power thus indirectly to suspend sentence and to permit the relator to go at large upon his own recognizance or upon parole, such power could not be conferred by his consent nor by his express request: *Harris v. People*, 128 Ill. 585, 15 Am. St. Rep. 153, 21 N. E. 563; *Morgan v. People*, 136 Ill. 161, 26 N. E. 651. <sup>300</sup> The rendering of judgment and the final sentencing of the defendant cannot be made a mere matter of discretion with the judge or the public prosecutor, nor to depend upon the subsequent conduct of the convicted person. If it were so, what subsequent conduct would demand or justify the pronouncing or the withholding of the sentence? And who would determine its character? Such conduct might be innocent in itself yet offensive to those in whom the power to apprehend or to punish resided. The liberty of the citizen cannot in a free country be made to depend for its security on the arbitrary will of any public officer; it can be taken from him by due process of law only.

The act of 1899, providing a system of parole (*Hurd's Stats.* 1901, p. 669) is the only law in this state authorizing the parole of a person convicted of crime. Provisions are made and means and instrumentalities are provided for its uniform operation and for its due administration. If the many criminal courts of the state had the power to enlarge persons convicted of crime on their own recognizance, during their good behavior or at the discretion of the presiding judge, there would, in effect, be in full force another and different system of parole without bounds or limitations and without uniformity, but wholly dependent in its operation, in each individual case, upon the discretion of the sitting judge. We are of the opinion, as we have already said, that no such power exists in the courts.

It follows that the imprisonment and detention of the relator by virtue of the mittimus issued in pursuance of the judgment and sentence so rendered were without authority of law, and that he should be, and accordingly is, discharged therefrom.

Relator discharged.

*A Court has no Power to Suspend* sentence after it has been pronounced, save for purposes of appeal: *Miller v. Evans*, 115 Iowa, 101, 88 N. W. 198, 91 Am. St. Rep. 43, and cases cited in the cross-reference note thereto. However, the practice obtains, to a greater or less extent, of suspending sentence: See *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547. In *Matter of Flint*, 25 Utah, 338, post, p. 853, 71 Pac. 531, a decision similar to that in the principal case is rendered.

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## MATHEWS v. PEOPLE.

[202 Ill. 389, 67 N. E. 28.]

**CONSTITUTIONAL LAW.—An Employer Whose Workmen** have left him and gone on a strike is entitled to contract with other workmen to fill the places of those who have left. (p. 250.)

**CONSTITUTIONAL LAW—Labor.—The Privilege of Contracting** is both a liberty and a property right. Liberty includes the right to make and enforce contracts, because such right is included in the right to acquire property. Labor is property. (p. 250.)

**CONSTITUTIONAL LAW—Special Legislation.—**If a statute does not relate to persons or things as a class, but to particular persons or things of a class, it is a special as distinguished from a general law. (p. 250.)

**CONSTITUTIONAL LAW.—A Statute Creating a Free Employment Agency**, which prohibits the furnishing of workmen or lists of workmen to employers whose men are out on a strike or are locked out, is unconstitutional. (p. 251.)

**CONSTITUTIONAL LAW—Statute Void in Part.—**If an unconstitutional section in a statute is of such import that its elimination would cause a result not contemplated or desired by the legislature, the entire statute is unconstitutional. (pp. 253, 254.)

**CONSTITUTIONAL LAW—License for Employment Agency.** The section of the Illinois statute creating a free employment agency, which imposes a license fee upon private employment agencies conducted for hire, is unconstitutional when considered as a part of the whole statute. (p. 256.)

**CONSTITUTIONAL LAW—Appropriation for Salaries.—**The section of the Illinois statute creating a free employment agency, which provides for the salaries of the officers and clerks of the institution, violates the constitutional provision that bills making appropriations for salaries shall contain no provision on any other subject. (p. 257.)

390 Indictment against the plaintiff in error for operating a private employment agency without having procured a license and given a bond, as required by section 10 of an act, entitled "An act to create free employment offices in cities of certain designated populations, and to provide for the maintenance, management and control of the same, and to prevent private



imitations of the name of the same, and regulating private employment agencies." The statute reads as follows:

**391** "Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That free employment offices are hereby created as follows: One in each city of not less than fifty thousand population, and three in each city containing a population of one million or over, for the purpose of receiving applications of persons seeking employment, and applications of persons seeking to employ labor. Such offices shall be designated and known as Illinois Free Employment Offices.

"Sec. 2. Within sixty days after this act shall have been in force, the state board of commissioners of labor shall recommend, and the governor, with the advice and consent of the senate, shall appoint a superintendent and assistant superintendent and a clerk for each of the offices created by section 1 of this act and who shall devote their entire time to the duties of their respective offices. The assistant superintendent or the clerk shall in each case be a woman. The tenure of such appointment shall be two years, unless sooner removed for cause. The salary of each such superintendent shall be twelve hundred dollars per annum, the salary of such assistant superintendent shall be nine hundred dollars per annum. The salary of such clerks shall be eight hundred dollars per annum, which sums, together with proper amounts for defraying the necessary costs of equipping and maintaining the respective offices, shall be paid out of any funds in the state treasury not otherwise appropriated.

"Sec. 3. The superintendent of each such free employment office shall, within sixty days after appointment, open an office in such locality as shall have been agreed upon between such superintendent and the secretary of the bureau of labor statistics as being most appropriate for the purpose intended; such office to be provided with a sufficient number of rooms or apartments to enable him to provide, and he shall so provide, a separate room or apartment for the use of women registering for situations **392** or help. Upon the outside of each such office, in position and manner to secure the fullest public attention, shall be placed a sign which shall read in the English language, Illinois Free Employment Office, and the same shall appear either upon the outside windows or upon signs in such other languages as the location of each such office shall render advis-

able. The superintendent of each such free employment office shall receive and record in books kept for that purpose names of all persons applying for employment or help, designating opposite the name and address of each applicant the character of employment or help desired. Separate registers for applicants for employment shall be kept, showing the age, sex, nativity, trade or occupation of each applicant, the cause and duration of (non) employment, whether married or single, the number of dependent children, together with such other facts as may be required by the bureau of labor statistics to be used by said bureau; provided, that no such special registers shall be open to public inspection at any time, and that such statistical and sociological data as the bureau of labor may require shall be held in confidence by said bureau, and so published as not to reveal the identity of anyone; and provided, further, that any applicant who shall decline to furnish answers to the questions contained in special registers shall not thereby forfeit any rights to any employment the office might secure.

"Sec. 4. Each such superintendent shall report on Thursday of each week to the state bureau of labor statistics the number of applications for positions and for help received during the preceding week, also those unfilled applications remaining on the books at the beginning of the week. Such lists shall not contain the names or addresses of any applicants, but shall show the number of situations desired and the number of persons wanted at each specified trade or occupation. It shall also show the number and character of the positions secured <sup>393</sup> during the preceding week. Upon receipt of these lists, and not later than Saturday of each week, the secretary of the bureau of labor statistics shall cause to be printed a sheet showing separately and in combination the lists received from all such free employment offices; and he shall cause a sufficient number of such sheets to be printed to enable him to mail, and he shall so mail, on Saturday of each week, two of said sheets to each superintendent of a free employment office, one to be filed by said superintendent, and one to be conspicuously posted in each such office. A copy of such sheet shall also be mailed on each Saturday by the secretary of the state bureau of labor statistics to each state inspector of factories and each state inspector of mines. And it is hereby made the duty of said factory inspectors and coal mine inspectors to do all they reasonably can to assist in securing situations for such applicants for work,

and describe the character of work and cause of the scarcity of workmen, and to secure for the free employment offices the co-operation of the employers of labor in factories and mines. It shall be the duty of such factory inspectors and coal mine inspectors to immediately notify the superintendent of free employment offices of any and all vacancies or opportunities for employment that shall come to their notice.

“Sec. 5. It shall be the duty of each such superintendent of a free employment office to immediately put himself in communication with the principal manufacturers, merchants and other employers of labor, and to use all diligence in securing the co-operation of the said employers of labor, with the purposes and objects of said employment office. To this end it shall be competent for such superintendents to advertise in the columns of daily newspapers for such situations as he has applicants to fill, and he may advertise in a general way for the co-operation of large contractors and employers in such trade journals or special publications as reach such <sup>394</sup> employers, whether such trade or special journals are published within the state of Illinois or not; provided, that not more than four hundred dollars, or as much thereof as shall be necessary, shall be expended by the superintendent of any one such office for advertising any one year.

“Sec. 6. It shall be the duty of each such superintendent to make report to the state bureau of labor statistics annually, not later than December 1st of each year, concerning the work of his office for the year ending October first of same year, together with a statement of the expenses of the same, including the charges of an interpreter when necessary, and such report shall be published by the said bureau of labor statistics annually with its coal report. Each such superintendent shall also perform such other duties in the collection of statistics of labor, as the secretary of the bureau of labor statistics may require.”

“Sec. 7. No fee or compensation shall be charged or received, directly or indirectly, from persons applying for employment or help through said free employment offices; and any superintendent, assistant superintendent or clerk, who shall accept, directly or indirectly, any fee or compensation from any applicant, or from his or her representative, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five dollars nor more than fifty dollars and imprisoned in the county jail not more than thirty days.

"Sec. 8. In no case shall the superintendent of any free employment office created by this act, furnish or cause to be furnished, workmen or other employes to any applicant for help whose employes are at that time on strike, or locked out; nor shall any list of names and addresses of applicants for employment be shown to any employer whose employes are on strike or locked out; nor shall such list be exposed where it can be copied or used by an employer whose employes are on strike or locked out.

395 "Sec. 9. The term 'applicant for employment' as used in this act shall be construed to mean any person seeking work of any lawful character, and 'applicant for help' shall mean any person or persons seeking help in any legitimate enterprise; and nothing in this act shall be construed to limit the meaning of the term 'work' to manual occupation, but it shall include professional service, and any and all other legitimate services.

"Sec. 10. No person, firm or corporations in the cities designated in section 1 of this act shall open, operate or maintain a private employment agency for hire, or where a fee is charged to either applicants for employment or for help, without first having obtained a license from the Secretary of State, which license shall be two hundred dollars per annum, and who shall be required to give a bond to the people of the state of Illinois, in the penal sum of one thousand dollars for the faithful performance of the duties of private employment agent; and no such private agent shall print, publish, or paint on any sign, window, or newspaper publication, a name similar to that of the Illinois free employment offices. And any person, firm or corporation violating the provisions of this act, or any part thereof, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars nor more than one hundred dollars.

"Sec. 11. Whenever, in the opinion of the board of commissioners of labor, the superintendent of any free employment office is not duly diligent or energetic in the performance of his duties, they may summon such superintendent to appear before them and show cause why he should not be recommended to the governor for removal, and unless such cause is clearly shown the said board may so recommend. In the consideration of such case an unexplained low percentage of positions secured to applicants for situations and help registered, lack of intelligent interest and application to the work, or a general inaptitude or



inefficiency, shall be considered by said <sup>396</sup> board a sufficient ground upon which to recommend a removal. And if, in the opinion of the governor, such lack of efficiency cannot be remedied by reproof and discipline, he shall remove as recommended by said board; provided, that the governor may at any time remove any superintendent, assistant superintendent or clerk for cause.

“Sec. 12. All such printing, blanks, blank books, stationery and postage as may be necessary for the proper conduct of the business of the offices herein created shall be furnished by the Secretary of State upon requisition for the same made by the secretary of the bureau of labor statistics.”

Robert N. Holt and H. T. Wilcoxon, for the plaintiff in error.

H. J. Hamlin, attorney general, Charles S. Dencen, state's attorney, and Frank W. Blair, for the people.

MAGRUDER, C. J. The question involved in this case, arising out of the refusal of the trial court to hold certain propositions of law submitted by the plaintiff in error, is the constitutionality of the “act to create free employment offices in cities of certain designated populations,” etc., as set forth in the statement preceding this opinion.

Section 8 of the act in question contains the following extraordinary provision: “In no case shall the superintendent of any free employment office, created by this act, furnish or cause to be furnished, workmen or other employes to any applicant for help, whose employes are at that time on strike, or locked out; nor shall any list of names and addresses of applicants for employment be shown to any employer whose employes are on strike or locked out; nor shall such list be exposed, where it can be copied or used by an employer, whose employes are on strike or locked out.” The act purports upon its face <sup>397</sup> to be a means of assisting persons, seeking employment, to obtain the same, and also of assisting employers, who need labor or help, to obtain the same. And yet section 8 declares that any employer, whose employes are on a strike, or have been locked out, shall not, when applying for help, be furnished any workmen or other employes. And not only so, but such employers, whose workmen may be on a strike or locked out, shall not be allowed to see any list of names or addresses of applicants for employment. And not only so, but no such list of applicants for employment shall be placed where it can be copied or used by an

employer whose employés are on a strike or locked out. Clearly, the exception contained in section 8 makes the act void as a whole, because that section enters into and pervades the whole act, and cannot be separated from it without defeating the intention of the legislature in passing the act.

An examination of the different provisions of the act shows that it professes to be for the benefit of employers, as well as of employés. Section 1 provides that free employment offices are thereby created, one in each city of not less than fifty thousand population, and three in each city containing a population of one million or over, "for the purpose of receiving applications of persons seeking employment, and applications of persons seeking to employ labor." If one of the purposes of creating free employment offices is to receive applications of persons seeking to employ labor, what justice can there be in refusing to entertain the applications for labor of employers whose employés may be on a strike, or may be locked out, irrespective of the question whether or not there is any good reason or justifiable cause for the existence of such strike or lockout? By the broad terms of section 8, the employer therein mentioned is deprived of the right to have any workmen furnished to him, or to have any list of applicants for employment shown to him, or to have any such list exposed where he can possibly <sup>398</sup> make use of it, even though his employés may have gone out upon a strike for no good cause whatever. A lockout has been defined to be the closing of a factory or workshop by an employer, usually in order to bring the workmen to satisfactory terms by a suspension of wages. Even though an employer may have had just cause and good reason for closing his factory or workshop, yet, even in such case, he is subjected to the deprivation enforced by section 8.

In section 3 of the act "the superintendent of each such free employment office shall receive and record in books kept for that purpose names of all persons applying for employment or help, designating opposite the name and address of each applicant the character of employment or help desired." The superintendent here referred to is to be appointed by the governor, not of his own motion, or in pursuance of his own selection, but upon the recommendation of the state board of commissioners of labor, which consists of five members, three of them "manual laborers," and the remaining members "manufacturers or employers of labor in some productive industry": 2 Starr & Cur-

tis' Annotated Statutes, 2d ed., p. 1807. The superintendent is not only required to receive and record the names of applicants seeking employment, but also of applicants seeking help, or seeking to employ labor. By the terms of section 4 the superintendent is required to report to the state bureau of labor statistics "the number of applications for positions and for help received." Here, again, the applications of employers for help are treated as being entitled to as much consideration as the applications of employes for positions or places of employment. The lists referred to in section 4 are required to show "the number of situations desired, and the number of persons wanted at each specified trade or occupation." Full information is thus obtained, and required to be obtained, by these superintendents, of the persons wanting workmen, as well as <sup>399</sup> of the persons wanting employment. Presumably, the needs of the employers in this regard cannot be known to the superintendent without the action of the employers themselves in giving information of their needs. By section 4, also, factory inspectors and coal mine inspectors are required to do all they reasonably can to assist in securing situations for applicants for work, and it is also made their duty to describe the character of work and cause of the scarcity of workmen, and to secure for the free employment offices the co-operation of the employers of labor in factories and mines. It is also made the duty of such factory inspectors and coal mine inspectors by section 4 "to immediately notify the superintendent of free employment offices of any and all vacancies or opportunities for employment that shall come to their notice." It thus appears that the co-operation of the employers of labor in factories and mines is to be sought. Inspectors of factories and mines are required to state the "cause of the scarcity of workmen," and to give notice "of any and all vacancies or opportunities for employment that shall come to their notice." If the scarcity of workmen shall be caused by strikes or lockouts, or if vacancies exist in factories or coal mines by reason of strikes and lockouts, the inspectors are required to give information in regard to the same to these superintendents. Although the free employment offices and their superintendents are located only in cities containing not less than fifty thousand population and in those containing a population of one million or over, yet the inspectors are required to report to them as to the condition of labor in factories and mines anywhere and everywhere in the state.

By section 5 the superintendent is required "to immediately put himself in communication with the principal manufacturers, merchants and other employers of labor, and to use all diligence in securing the co-operation of the said employers of labor, with the purposes and objects <sup>400</sup> of said employment offices." Manufacturers and merchants and other employers of labor are thus to be communicated with, and all diligence is to be used to secure their co-operation in carrying out the purposes and objects of these free employment agencies, and yet such employers are to be deprived of all the benefit to be derived therefrom, if those employed by them happen to be on a strike or to be locked out, whether with or without justifiable cause. By the terms of section 9, "applicant for employment" means "any person seeking work of any lawful character"; and "applicant for help" means "any person or persons seeking help in any legitimate enterprise."

Thus, all the way through the act, the employer, seeking men to work for him, and the employé, seeking work to do, are placed upon the same footing, and the equally entitled to the benefits of the act in question. Employers, however, are arbitrarily divided into two classes—one class where a strike or lock-out may exist, and another class where no strike or lockout exists. There is no rational basis in law or justice for this distinction, where the language is so broad as to include, as well those who have caused the strike or lockout for good reasons, as those who have caused such strike or lockout without any good reason. The prohibition contained in section 8 not only affects the class of employers there named, but it also affects the persons seeking employment, with whom such employers might otherwise come in contact, that is to say, not only the employers, whose men are on a strike or are locked out, are affected by the prohibition, but laborers or employés, who might desire to fill the places of the employés who are on a strike or are locked out, are also affected by it. The applicants for employment are deprived of the privilege of working for the class of employers named in section 8. That section, therefore, strikes at the interests of applicants for work and of employers seeking work or labor.

<sup>401</sup> An employer whose workmen have left him and gone upon a strike, particularly when they have done so without any justifiable cause, is entitled to contract with other laborers or workmen to fill the places of those who have left him. Any work-



man seeking work has a right to make a contract with such an employer to work for him in the place of any one of the men who have left him to go out upon a strike. Therefore, the prohibition contained in section 8 strikes at the right of contract, both on the part of the laborer and of the employer. It is now well settled that the privilege of contracting is both a liberty and a property right. Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate section 2 of article 2 of the constitution of Illinois, which provides that "no person shall be deprived of life, liberty or property without due process of law." It is equally a violation of the fifth and fourteenth amendments of the constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law, and that no state shall deprive any person of life, liberty or property without due process of law, "nor deny to any person within its jurisdiction the equal protection of the laws": *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454; *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314; *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985. The provision, embodied in section 8, "is a discrimination between different classes of citizens founded on no justifiable ground, and an attempt to exercise legislative power in behalf of certain classes and against other classes, whether laborers seeking work or employers. It falls under the condemnation of the constitution."

Section 8 draws an unwarrantable distinction between workmen who apply for situations to employers where there is no strike or lockout, and workmen who <sup>402</sup> do not so apply, and it also draws an unwarrantable distinction between employers who may have the misfortune to be the victims of a strike or lockout, and employers who do not have such misfortune; that is to say, section 8 does not relate to persons and things as a class, or to all employers, but only to those who have not been the victims of strikes or lockouts. "Where a statute does this, where it does not relate to persons or things as a class, but to particular persons or things of a class, it is a special as distinguished from a general law": *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. Judge Cooley, in his work

on Constitutional Limitations (sixth edition, pages 481, 483), says: "A statute would not be constitutional . . . . which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. . . . Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments": *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. The conclusion is inevitable that this section 8 is a provision "in aid of strikes and strikers, whether right or wrong, and regardless of the justice or the propriety of the strike or lockout."

By the terms of this law, the statute creates free employment agencies, and provides for the payment of those who operate them out of the money of the people of the state; and yet it singles out a particular class of citizens, and, without cause, deprives them of the benefits of the provisions of the act, while it grants such benefits to another class of persons, who have no greater right to the same than the persons subjected to the deprivation.

The fourteenth amendment to the constitution of the United States provides, that "no state shall make or <sup>403</sup> enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In interpreting this provision of the federal constitution, the federal and state courts hold an act, like the one here under consideration, which is unduly discriminating and partial in its character, to be unconstitutional. In other words, legislation of this kind is condemned by the courts. The legislature has no power to deny to the employer, whose men are out upon a strike or are locked out the right to obtain workmen from these free employment agencies, and at the same time to grant such right to other employers not similarly situated: *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 451; *Ruhrstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41.

We are unable to see why the doctrine, recently announced by the supreme court of the United States in the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 541, 22 Sup. Ct. Rep. 431, is not precisely applicable to the facts in the case at bar. In the latter case, the supreme court of the United States declared what is known as the anti-trust act of 1893 of the state of Illinois to be unconstitutional and void, as being in conflict with the provisions of the fourteenth amendment above quoted, upon the ground that it improperly discriminated in favor of agricultural products or livestock in the hands of the producer or raiser: *People v. Butler Street Foundry Co.*, 201 Ill. 236, 66 N. E. 349. The Illinois act of 1893 provided substantially that where two or more persons, firms, corporations or associations of persons, combined their capital, skill or acts in respect of their property, merchandise or commodities held for sale or exchange, they should be subjected to a certain penalty as being guilty of forming a trust, but the ninth section of the act contained this exception, to wit: "The provisions of this act shall not apply to agricultural products <sup>404</sup> or livestock while in the hands of the producer or raiser." In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 541, 22 Sup. Ct. Rep. 431, the supreme court of the United States said: "We have seen that under that statute all except producers of agricultural commodities and raisers of livestock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and livestock raisers, in respect of their products of livestock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state. The statute so provides, notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturalists and raisers of livestock, are all in the same general class—that is, they are all alike engaged in domestic trade, which is of right open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe." It was held in that case, that such discrimination against those engaged in business other than the sale of agricultural products and livestock in the hands of producers, was forbidden by the clause of the fourteenth amendment, which declares that no state "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the

laws." It was also there held that the fourteenth amendment, in making the declaration above quoted, "intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention <sup>405</sup> and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition," etc. These principles are precisely applicable to the present case, where a greater burden is imposed by section 8 upon employers who are subjected to strikes and lockouts, than upon other employers in the same calling and condition, who are not subjected to such strikes and lockouts, irrespective of the justice or propriety of the strike or lockout.

It is claimed, however, by the attorney general that section 8 can be eliminated from the employment act without invalidating the rest of the act. Undoubtedly, "if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative": *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 541, 22 Sup. Ct. Rep. 431. In the *Connolly* case it was held by the supreme court of the United States that the exception, contained in section 9 of the Illinois act of 1893, made the whole act invalid. Upon this subject the supreme court of the United States there say: "The first section of the act here in question embraces by its terms all persons, firms, corporations, or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or livestock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and livestock



dealers. Those classes would in that way be reached and fined, when, evidently, the legislature <sup>406</sup> intended that they should not be regarded as offending against the law, even if they did combine their capital, skill, or acts in respect of their products or stock in hand. Looking, then, at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute, unless agriculturalists and livestock dealers were excluded from its operation, and thereby protected from prosecution. The result is, that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional, as denying the equal protection of the laws to those within its jurisdiction, who are not embraced by the ninth section."

In the case at bar, if section 8 be eliminated from the employment act, the other sections without it would cause results not contemplated or desired by the legislature. This is so, because without the obnoxious clause or section, all employers, including those whose workmen are out upon a strike or are locked out, as well as all others, would be entitled to the benefits of the act. But clearly it was the intention of the legislature, by inserting section 8 in the act, to deprive the class of employers therein named of the benefits of the act. Consequently, the elimination of that section would not be in accordance with the manifest intention of the legislature. An elimination of section 8 would make the act apply to all classes of employers, and thereby cause a result evidently not contemplated or desired by the legislature. If all the sections of the act be construed together, it is evident that the legislature would not have created the free employment agencies in question, unless the class of employers mentioned in section 8 were excluded from the operation of the act. It follows that the employment act of April 11, 1899, must be regarded as unconstitutional as an entirety.

Section 10 of the act, under which the present prosecution was instituted, depends upon all the other provisions <sup>407</sup> of the act, and is so connected with them that it cannot stand by itself. Section 1 of the act provides for the creation of free employment agencies, and section 7 of the act provides that no fee or compensation shall be charged or received directly or indirectly from persons applying for employment or help from the free employment offices. Section 10, following immediately upon the provisions in reference to free employment agencies where no fee is charged, provides that no person, etc., shall

maintain a private employment agency for hire, or where a fee is charged, without first having obtained a license, etc., which license is fixed at the sum of two hundred dollars per annum. Whatever else may have been the purpose of section 10, whether designed for revenue or for regulation, or as an exercise of the police power, or otherwise, its evident design was to discourage the existence of private employment agencies by compelling them to pay a heavy license fee, and to throw business into the hands of free employment agencies where no fee is charged. X The purpose also of section 10 was to prevent imitation of the name of the free employment agencies in the mode therein indicated. It follows that the whole act, including section 10, relates to but one subject, the creation and operation of free employment agencies; and when the act is declared unconstitutional so far as the free employment agencies are concerned, section 10 falls with the balance of the act, because it is merely a part of the scheme to promote the business of the free employment agencies and secure their successful operation. Section 10 provides that any person, etc., violating the provisions of the act, or any part thereof, shall be deemed guilty of a misdemeanor. Therefore, any superintendent who furnishes or causes to be furnished workmen or other employés to any applicant for help whose employés are at that time on strike or locked out, or shall show to any such employer any list of names and addresses of applicants for employment, or expose the same where <sup>408</sup> it can be copied or used by such employer, would be deemed guilty of a misdemeanor and subject to the punishment prescribed by section 10. Section 10 is directed mainly against the imitation by private employment agencies of the name of the Illinois free employment offices, and, of course, if the part of the act in reference to such free employment offices is void for the reasons already stated, then the necessity for section 10 no longer exists. There can be no doubt that section 10 "would never have been enacted as a law without the remainder of the act. . . . The legislature would not provide against imitation of something having no existence, and would provide for the free agencies before providing that they should not be imitated."

In the case of *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, the validity of section 10 only of the free employment agency act was passed upon. Although the errors assigned in that case were broad enough to have raised the ques-

tion of the validity of the entire act, yet the only question presented by counsel in their arguments in that case was the validity of section 10. It was there held that section 10, requiring persons operating private employment agencies for hire in certain cities to pay a license fee of two hundred dollars per annum, and give a bond for one thousand dollars, was not unconstitutional, upon the grounds that conducting a private employment agency for hire is an occupation, for which the legislature may require a license fee, in order to promote the public welfare, and that, in the exercise of its police power, the legislature may provide that an occupation, which is a proper subject of such power, shall not be followed, except under a license issued by public authority upon the payment of a license fee, and the execution of a bond in accordance with the purposes of the act. But section 10, as there passed upon, was considered as standing by itself, and without reference to its connection with the balance of the act. No decision was there made as to the validity of the act as an <sup>409</sup> entirety. Upon further reflection we are satisfied that, while the views there expressed may be correct as applicable to a section like section 10 standing by itself, yet when applied to section 10 as a part of the whole act, they ought not to be adhered to. The case of *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, was decided in October, 1901, and the rehearing therein applied for was denied in December, 1901. Since that time, to wit, in March, 1902, the supreme court of the United States has announced its decision in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 541, 22 Sup. Ct. Rep. 431, and the latter case hold that legislation, containing such an exception as section 8 of the act of April 11, 1899, is in contravention of the fourteenth amendment of the constitution of the United States. As the supreme court of the United States is paramount authority upon all questions relating to the interpretation of the constitution of the United States, we feel it to be our duty to follow the holding of that court to the effect that such legislation, as is here under consideration, is a violation of the fourteenth amendment: *Mapes v. Scott*, 94 Ill. 379. Therefore, the case of *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, is overruled.

Counsel for the plaintiff in error are correct in the contention that section 2 of the act of April 11, 1899, is violative of the constitution of Illinois. Section 2 of the act, after fixing the amount of salaries to be paid the superintendent, assistant su-

perintendent and clerks, provides as follows: "Which sums, together with proper amounts for defraying the necessary costs of equipping and maintaining the respective offices, shall be paid out of any funds in the state treasury not otherwise appropriated." This provision is in conflict with section 16 of article 4 of the constitution of this state, which provides as follows: "The general assembly shall make no appropriation of money out of the treasury in any private law. Bills making appropriations for the pay of members and officers of the general assembly, and for the salaries of the officers of the government, shall contain <sup>410</sup> no provision on any other subject": 1 Starr & Curtis' Annotated Statutes, 2d ed., p. 131. The superintendents, assistant superintendents and clerks, mentioned in the act, are officers of the government within the meaning of section 16, as construed in the case of *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, and, therefore, their salaries must be provided for by separate act or bill. Section 16 of article 4 makes such appropriations an independent subject of legislation, and consequently section 2 is void. If the act were otherwise constitutional, section 2, being distinct and separable from the balance of the act, would not affect the same, and could be eliminated so as to allow the remainder of the act to stand. But in view of the considerations already presented, the whole of the act, including section 2, must fall.

Accordingly, the judgment of the criminal court of Cook county is reversed.

Carter and Boggs, JJ., do not concur in the conclusion reached by the majority of the court.

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*The Right to Contract* as one sees fit stands untrammelled, as a general rule; but the state may restrict it in the interest of public health, morals, and the like: *Davis Coal Co. v. Polland*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. For instances of statutes having a tendency to invade this right as between employer and employé, see *State v. Kreutzberg*, 114 Wis. 530, 90 N. W. 1098, 91 Am. St. Rep. 934, and cases cited in the cross-reference note thereto; *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 92 Am. St. Rep. 930, and cases cited in the cross-reference note thereto; *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; *Cleveland v. Clements Bros. etc. Co.*, 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885.

*As to Statutes Void in Part*, see *Ballentine v. Willey*, 3 Idaho, 496, 31 Pac. 994, ante, p. 17, and cases cited in the cross-reference note thereto.



## COBB v. COMMISSIONERS OF LINCOLN PARK.

[202 Ill. 427, 67 N. E. 5.]

**PUBLIC WATERS.**—The Title to the Soil of Navigable Waters, below high-water mark is in the sovereign, except so far as a citizen has acquired rights in it by grant, prescription, or usage; and this title, whether in the sovereign or the subject, is held subject to the public right of navigation and fishing. (pp. 258, 259.)

**PUBLIC WATERS**—Submerged Land.—The Legislature of Illinois is competent to grant the submerged lands of Lake Michigan to park commissioners for certain specific purposes. (p. 260.)

**PUBLIC WATERS**—Wharves.—The Owner of Submerged Lands has a right to say whether he will allow the owner of adjoining dry land to build out a wharf into the water on the soil of the former. (p. 261.)

**PUBLIC WATERS**—Structures on Submerged Lands.—A riparian owner has no right to build any structures on the submerged lands in front of his own land unless he owns such submerged lands or has license to do so. (p. 264.)

**PUBLIC WATERS**—Wharves.—The Title of the Owner of Submerged Lands is not burdened with an easement in favor of the owner of adjoining upland to build wharves out to navigable water. (p. 264.)

**PUBLIC WATERS**—Wharves, License from Secretary of War to Build.—The right of the owner of upland to construct a wharf over the submerged land of his neighbor, without the latter's consent, cannot be acquired by obtaining a license from the Secretary of War. (p. 265.)

Pence & Carpenter, for the appellant.

Frank Hamlin, for the appellees.

**430** CARTER, J. The only question in this case, as stated by appellant, is whether the owner of land bordering on and adjacent to the waters of Lake Michigan has a right of access from his own property to a point in the lake where the waters are navigable, and whether, in the exercise of this right, he may erect a wharf or pier from his shore line over the submerged lands in the shallow water to the point of navigability in the lake. Appellant insists that the riparian owner has this right of access, and **431** that it includes the right to wharf out—that is, to erect wharves and piers in front of his land.

The riparian owner's right of access from his land to the lake—in other words, the right to pass to and from the waters of the lake within the width of his premises as they border on the lake—has been expressly recognized by this court as a common-law right, which cannot be taken from him without just compensation: *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep.

257, 52 N. E. 1052. In a large number of the cases relied on by the appellant this right of access was the only question involved, and they are authority only to that extent. It is true, the courts in many cases have indulged in general expressions as to what is included in the owner's right of access to the water, and have stated the right to erect wharves and piers as one of the rights included therein; but this was by way of illustration, and was not necessary to the decision of the case. Many judges, in dealing with the question of riparian rights, seem to have enlarged on those rights, and to have assumed that the right to erect a wharf on the shore and into the water, even to the point of navigability, was a common-law right, although the point decided did not involve this question.

This whole subject is intimately connected with the ownership of the soil under the water of the sea, lake or navigable stream, as the case may be. In England, since the time of Lord Hale, it has been treated as settled that the title in the soil of the sea or of arms of the sea, below ordinary high-water mark, is in the sovereign, except so far as an individual or a corporation has acquired rights in it by express grant or by prescription or usage, and that this title, *jus privatum*, whether in the sovereign or in the subject, is held subject to the public right, *jus publicum*, of navigation and fishing: *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548. This is the doctrine of this state as applied to the lands under the navigable waters of Lake Michigan: *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277, 45 N. E. 830; *Revell v. People*, 177 Ill. 468, 69 Am. St. Rep. 257, 52 N. E. 1052.

<sup>432</sup> The state has granted the land covered by the waters of Lake Michigan that lies immediately in front of appellant's lands to appellees, the park commissioners, for certain specific purposes, and the title thereto is now in them for the purposes declared in the act: Act of June 15, 1895; Laws 1895, p. 282. This the legislature was competent to do: *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277, 45 N. E. 830. The property in the dry land or upland being in one person and the property in the submerged land immediately in front thereof being in another, it would seem to be only consonant with legal principles that the consent of the latter must be obtained before any erections can be put on the submerged soil. But the appellant claims that by the common law he had the right to erect a wharf or other structure in aid of navigation on the submerged land in front of his upland, and that the title of appellees is burdened

with such easement or right in him. In *Revell v. People*, we said (page 484, 177 Ill., page 157, 69 Am. St. Rep., and page 1057, 52 N. E.): "In the well-known case of *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, the supreme court of the United States, after a thorough examination of the authorities, held that the common law of England is the law of this country upon the question of the rights of a shore owner, except where it has been modified by the constitutions, statutes or usages of the different states or by the constitution and laws of the United States. The court also held that the rights of these owners have been committed to the several states, and that each state has dealt with the lands under tide water within its boundaries according to its own notion of right and public policy." "This state has adopted the common law as it existed prior to March 24, 1606—the fourth year of James I—and in the absence of any statute of the state changing the common law in regard to rights of riparian or littoral owners, the common law as it then existed, must control": Page 479, 177 Ill., page 257, 69 Am. St. Rep., and page 1055, 52 N. E. "We are aware of no statute of this state changing the common law, nor has there been established <sup>433</sup> any custom or usage which modifies the common law": Page 484, 177 Ill., page 257, 69 Am. St. Rep., and page 1057, 52 N. E.

What, then, is the common law in regard to the right of a riparian owner to build a wharf out from his upland into the waters of the lake?

In a note to *City of Madison v. Mayers*, 40 L. R. A. 635, the author treats the whole subject of the right to build wharves exhaustively. In England there were several adverse rights to be considered in determining whether or not a riparian owner had a right to construct a wharf. We need refer to but two in this discussion. There was the king's *jus privatum* in the soil covered by water, and there was the *jus publicum*, which was the right to have the water kept free from obstructions for the purpose of navigation. An interference with this latter right was a nuisance, and would be abated as such. It is stipulated in the case at bar that the appellant's wharf, if erected, would not obstruct, interfere with, burden or prevent navigation upon Lake Michigan. This question is, therefore, not in the case. An invasion of the king's *jus privatum*, or private property in the soil covered by water, was a purpresture. It is laid down by all the old writers that it might be committed either against the king,

the lord of the fee or any other subject. A purpresture is not a nuisance unless it also interferes with navigation. It may be abated by the crown or the owner of the shore, or restrained by injunction at the suit of the attorney general, whether it creates a nuisance or not. The remedy for the crown was either by an information of intrusion at the common law, or by an information at the suit of the attorney general in equity. In case of a judgment upon an information of intrusion, the erection complained of, whether it was a nuisance or not, was abated. But upon a decree in equity, if it appeared to be a mere purpresture without being at the same time a nuisance, the court might direct an inquiry to be made whether it was more beneficial to the crown to abate the purpresture <sup>434</sup> or to suffer the erections to remain and be arrented: Lord Hale in Harg. Law Tracts, p. 85; Coulson & Forbes on Waters, p. 15; Wood on Nuisances, sec. 84; Eden on Injunctions, c. 11; Story's Equity Jurisprudence, sec. 922; Gould on Waters, sec. 21; Angell on Tide Waters, p. 200; Revell v. People, 177 Ill. 468, 69 Am. St. Rep. 257, 52 N. E. 1052; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. Rep. 548, and cases cited.

It has been generally recognized by the courts that wharves are almost as essential to commerce as the waterways themselves. The proceeding at the common law to obtain leave to build a wharf on the king's tide land was by a writ of *ad quod damnum* to ascertain what injury would ensue. Upon the return of a favorable verdict the proposed work was authorized by the king's license. Without such a writ and a favorable inquisition thereof, those who erected such purprestures did it at their peril and took the risk of the structure being pronounced a nuisance or abated: Gould on Waters, sec. 21; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718; King v. Russell, 6 Barn. & C. 566. The language used shows that the owner of the submerged soil, at common law, had the right to say whether he would allow the owner of the adjoining dry land to build out a wharf into the water on the soil of the former, or not.

In *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155, it was said that one of the earliest objects to which the settlers in Massachusetts gave their attention was commerce. For this purpose wharves erected below high-water mark were a necessity. But the colony was not able to build them at public expense. To induce persons to erect them the common law of England was altered by ordinance, providing that the proprietors of land ad-



joining on the sea should hold to low-water mark where the tide did not abate more than one hundred rods. This was the ordinance of 1647, commonly known as the "ordinance of 1641": *Commonwealth v. Alger*, 7 Cush. 53.

How the American colonies, the original states of the Union, modified the common law to suit their needs, <sup>435</sup> both by custom and usage and by statute, is elaborately discussed by Mr. Justice Gray in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, and it would be a work of supererogation to review the ground he has so ably covered. His conclusion is: "There is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another."

A number of American cases sustaining the right of the riparian owner to wharf out seem to be based on expressions as to the common law found in some of the English cases; others are really founded on the rule of the state extending the ownership of the riparian owner to the center thread of the stream. A large number of these cases merely determine the riparian owner's right of access, and the right to wharf out was not in controversy. The cases most generally relied on in this country to sustain this right are *Dutton v. Strong*, 1 Black, 23, *Railroad Co. v. Schurmeier*, 7 Wall. 272, *Yates v. Milwaukee*, 10 Wall. 497, and *Illinois etc. R. R. Co. v. Illinois*, 146 U. S. 387, 13. The authority of these cases has been substantially repudiated by *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, in which it was said that none of the three cases first named called for the laying down or defining of any general rule, independent of local law or usage or of the particular facts before the court. Speaking of these cases this court said in *Revell v. People* (page 488, 177 Ill., 69 Am. St. Rep. 257, 52 N. E. 1059): "If the three cases cited did not call for the laying down of a general rule independently of local law or usage in the states, as was held in the *Shively* case, the doctrine laid down in the *Illinois Central* case could not be predicated upon those cases. Moreover, we regard the rule established by the common law as <sup>436</sup> the safer and better doctrine, and as each state has the right to

determine for itself the title and rights of riparian owners within its border, we regard it a better policy for all concerned to adhere to the common-law rule, rather than follow the doctrine laid down in the Illinois Central case."

In *Seranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. Rep. 48, the only questions to be decided were the right of access to a navigable stream, and the owner's right to compensation when this right of access was injured or lost by any act of the general government in aid of navigation. In *Morris v. United States*, 174 U. S. 196, 19 Sup. Ct. Rep. 649, it was held that the claimants were not riparian owners, as a public street intervened between them and the river, and consequently there was no question of the extent of riparian rights to be decided. In the *Revell* case this court stated the rights of a riparian owner, at common law, to be the right to accretions and the right of access—that is, the right to pass to and from the waters of the lake within the width of his premises as bordered on the lake, and then said (page 484): "These are common-law rights, and, as we understand the law, they are the only common-law rights possessed by the shore owner. Other rights may have been conferred in different states by statute, usage or custom, but the question involved here is, whether such additional rights exist in this state." It is further said (page 485): "Under the common law as declared in this case (*Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548), and it is fully sustained by the authorities, it is apparent that appellant, as owner of premises bounded on Lake Michigan, took no title to any submerged lands under the waters of the lake, nor did he, by virtue of being a shore owner, have any right to construct piers upon the submerged lands without the consent of the state." The question to be decided in the *Revell* case was, whether the riparian owner had the right to build piers out in the water in order to protect the shore of his lands from erosion. This right was denied, and the <sup>437</sup> court further said (page 489): "As we understand the common law, any structure placed upon the land of the state below or beyond the water's edge in the waters of the lake is a purpresture, and may be abated in a proceeding instituted on behalf of the people."

After a careful reading of the authorities we see no reason to recede from the position taken in the *Revell* case, and are satisfied that by the common law, unmodified by local usage, custom or statute, a riparian owner had no right to build any

structures on the submerged lands in front of his own land unless he owned such submerged lands or had a license to do so. The title of the owner of such submerged lands is not burdened with an easement in favor of the owner of the adjoining upland to build wharves out to navigable water. Such being the common law, it is the law of this state until altered by the legislature.

Appellant also claims that by virtue of the license from the Secretary of War he is entitled to build this wharf, because, as he says, a license from the executive officer of the government to build this wharf means permission and authority from the United States government to do so, and such permission and authority being granted, neither the state nor any of its agents have any control over the subject matter. He refers to the river and harbor act of Congress of September 19, 1890 (26 Stats. at Large, c. 907, p. 426), as sanctioning his contention. Section 7 of this act was superseded by sections 9 and 10 of the river and harbor act of March 3, 1899: 30 Stats. at Large, c. 425, pp. 1121, 1151. Section 10 of the latter act is as follows: "That the erection of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures, in any port, roadstead, haven, harbor, <sup>438</sup> canal, navigable river or other water of the United States outside established harbor lines or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner alter or modify, the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the Secretary of War prior to beginning the same." These provisions of the law were designed to protect the navigable waters of the United States from encroachment and from obstructions to navigation, and commit the duty of their protection to an officer of the general government, without whose permission no structures can be erected in them.

It is conceded that the power of Congress over the navigable waters of the country is derived from the commerce clause in the constitution of the United States, and that it is exclusive and paramount whenever Congress has definitely spoken on any subject under its jurisdiction. It has been held by the federal courts that when Congress has authorized the erection of a bridge it is not necessary to obtain the consent of the state authorities for its erection, and that no compensation need be made to the state for the use of its property in the lands under water (*Stockton v. Baltimore etc. R. R. Co.*, 32 Fed. 9), and that an individual has no claim for compensation when the general government erects piers on his submerged lands in aid of navigation and thus cuts off his access to the water: *Seranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. Rep. 48. But however that may be, we are of the opinion that the act prohibiting the erection of wharves without the consent of the Secretary of War is a mere regulation for the benefit of commerce and navigation, <sup>439</sup> and that the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation, and not that it is equivalent to a positive declaration by the authority of Congress that the licensee may build the wharf or other structure without first obtaining the consent of the owner of the submerged land on which it is his purpose to build. Appellant not having, by the law of this state, the right to construct a wharf over his neighbor's submerged lands without his neighbor's consent, could not acquire that right, without his neighbor's consent, by obtaining a license from the Secretary of War.

We are further strengthened in this view by section 11 of the act of Congress of 1899 (a substantial re-enactment of section 12 of the act of 1890), which authorizes the Secretary of War to establish harbor lines, beyond which no piers, wharves, bulkheads or other works shall be extended except under such regulations as may be prescribed from time to time by him. When harbor lines are established, no permit or license from the Secretary of War is necessary to build a wharf not extending beyond such lines. It certainly cannot be said that because the statute does not make a license necessary in such a case, a riparian owner can build his wharf within the harbor lines, in a state where the right to wharf out is not recognized, without the consent of the owner of the submerged land. The fixing of har-



lor lines is only a finding by an officer of the government that erections within such lines will not injure or interfere with navigation. If parties choose to build within such harbor lines the general government will not interfere. It is not a declaration touching the rights of the owners of the submerged lands in the harbor. When harbor lines are not established, or beyond established harbor lines, the permission of the general government to build a wharf in navigable waters is necessary. But such permission <sup>440</sup> is not given to override the rights of the owners of the submerged lands. It is, as said above, a declaration by the guardian of the interests of the public at large that the proposed structure will not interfere with navigation. It is strictly permissive, and not an authorization by paramount authority to build the structure.

The decree of the circuit court will be affirmed.

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*The Rights of Land Owners in Navigable Waters* fronting their property, and in the soil thereunder, are considered in the monographic note to *Miller v. Mendenhall*, 19 Am. St. Rep. 226-235. As to the right to build wharves, see *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, and monographic note. A riparian proprietor ordinarily has the right to connect himself with navigable waters by means of wharves or docks, so long as he does not interfere with the rights of others or of the public: *Chicago v. Van Ingen*, 152 Ill. 624, 43 Am. St. Rep. 285, 38 N. E. 894; *Prior v. Schwartz*, 62 Conn. 132, 36 Am. St. Rep. 333, 25 Atl. 398; *Rumsey v. New York etc. Ry. Co.*, 133 N. Y. 79, 28 Am. St. Rep. 600, 30 N. E. 654; *Lewis v. Portland*, 25 Or. 133, 42 Am. St. Rep. 772, 35 Pac. 256; *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123, 46 N. W. 128.

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## ILLINOIS CENTRAL RAILROAD COMPANY v. LEINER.

[202 Ill. 624, 67 N. E. 398.]

**A RAILROAD COMPANY is Liable for the Death of a Trespasser** on its train due to the reckless or wanton conduct of its employes, or gross negligence amounting to willfulness. (p. 269.)

**NEGLIGENCE—Willful or Wanton Conduct.**—Whether a personal injury has been inflicted by willful or wanton conduct or gross negligence is a question of fact for the jury. (p. 270.)

**NEGLIGENCE—Willful or Wanton Act.**—Gross Negligence, to be equivalent to a willful or wanton act, is such negligence as to imply a disregard of consequences or a willingness to inflict injury. (p. 270.)

**NEGLIGENCE—Willful and Wanton Act.**—Ill-will is not a necessary element of willful and wanton negligence. (p. 271.)

**RAILROADS—Fellow-servants.**—A Conductor Riding Home on free transportation to visit his family over Sunday is not a fellow-servant with the employes operating the train. (p. 278.)

Kramer, Creighton & Shaeffer and John G. Drennan, for the appellant.

M. W. Borders, for the appellee.

**625** MAGRUDER, C. J. Upon the trial of this case no instructions were asked by the appellee. The appellant presented to the trial court twenty-three instructions to be given to the jury, of which twelve were given as asked and eleven were refused. No complaint is made as to the action of the trial court in the admission or exclusion of evidence. Substantially, the only question in the case is that which arises from the refusal of the trial court to instruct the jury to find for the defendant. Nearly all the instructions asked by the appellant and given in its behalf left it to the jury to determine whether the servants of the appellant in charge of the trains which collided, or any of them, were at the time guilty of such willful and wanton misconduct as directly contributed to the death of appellee's intestate, William A. Wing. The only material question, therefore, is whether there is sufficient evidence in the record tending to prove such wantonness or willfulness. That question has been settled in favor of appellee by the judgments of the lower courts. As, however, appellant claims that the evidence does not tend to show that the injury which resulted in Wing's death was wantonly and willfully inflicted, the evidence will be examined so far as it bears upon that proposition.

1. Appellant claims that at the time deceased lost his life he was a trespasser upon the freight train upon which he was riding. The deceased was an employé **626** of the appellant as a conductor upon one of its freight trains, but, as we understand the evidence, on the evening of Saturday, January 11, 1901, he had brought his freight train to East St. Louis, and was there released from his work, so that he was entitled to go to his home at Sparta to spend Sunday. In order to reach Sparta, it was necessary for him to ride upon one of appellant's trains from East St. Louis to Coulterville, passing through Belleville. Belleville is thirteen miles southeast from East St. Louis. On the evening of January 11th, the deceased obtained from the proper officials at Carbondale by telegraph a telegraphic pass, permitting him to ride on a certain passenger train No. 203, which was to leave East St. Louis at 9:04 P. M. that evening. The pass did not reach him until 8:58, about six minutes before the passenger train was to start. As we under-

stand the proof, it was necessary for him to walk some five hundred feet to reach the passenger train from the place where he obtained his pass, and it is quite evident that he missed the train from lack of time to reach it. He then made application to the conductor of freight train No. 255 for transportation on that train to Coulterville through Belleville. He stated to the conductor that transportation had been furnished to him, and the conductor permitted him to go upon the train, and told him to enter the caboose, and go to bed, and he would wake him up when they reached Coulterville. The conductor did not require him to exhibit his pass or any evidence of his right to travel upon the freight train. Freight train No. 255 consisted of thirty cars drawn by one engine with a caboose at the end of the train. Although this train was to leave East St. Louis at 10 o'clock, it did not actually get started until 12:40, and, although it ordinarily took only one hour to go from East St. Louis to Belleville, being a distance of only thirteen miles, yet the train did not reach Belleville until 3:20 on the morning of January 12, 1901. It consumed two hours and 627 forty minutes in making the journey from East St. Louis to Belleville. The delay was caused by the inability of the engine to haul the thirty cars to the top of the elevation near the western limits of the city of Belleville. The conductor was obliged to divide his train and take each half up the hill separately. In addition to this it was necessary to detach the engine and go to Belleville and get water and return. The deceased went to sleep in the caboose before train No. 255 left East St. Louis, and was asleep in the caboose when the train arrived at Belleville. By the terms of some rule of the company, as is claimed by the appellant, freight train No. 255 carried no passengers, though no such rule was produced in evidence.

It is claimed that the deceased was a trespasser, upon the alleged ground that, although he was an employé of the company—though not then engaged in the work of the company—and although the company was then indebted to him in the sum of one hundred dollars for services performed by him, yet that he had not become a passenger while riding upon this freight train, which was not authorized to carry passengers, notwithstanding the fact that he was riding with the consent of the conductor. In other words, the deceased is alleged to have been a trespasser, because he was riding on a freight train in

violation of a rule of the company. We do not deem it necessary to stop to discuss the question whether he was a trespasser or not, because of the facts thus stated. If he was, the appellant would be liable if he was killed through the wanton or reckless conduct of the appellant's employes in charge of the trains.

In *Toledo etc. Ry. Co. v. Beggs*, 85 Ill. 80, 84, 28 Am. Rep. 613, we said: "Was defendant in error a passenger on this train, in the true sense of that term? He was traveling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under <sup>628</sup> such circumstances the company could only be held liable for gross negligence, which would amount to willful injury." We have discovered nothing in the conduct of the deceased, as developed by the testimony in this regard, to indicate that he was guilty of any fraud against appellant, or practiced any deceit upon the conductor of freight train No. 255. But even if he had been guilty of such fraud, the appellant would be liable in this action, if it was guilty of such gross negligence as amounted to willful injury: See, also, *Chicago etc. Ry. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587, 24 N. E. 417. In the cases of *Toledo etc. Ry. Co. v. Brooks*, 81 Ill. 245, and *Cleveland etc. Ry. Co. v. Best*, 169 Ill. 301, 48 N. E. 684, no question of wantonness or recklessness is involved or raised in the pleadings.

The view, thus expressed, was embodied by the appellant in several of the instructions asked by it, and given in its behalf by the trial court. One of those instructions was as follows: "The court instructs the jury that, even if you believe from the evidence in this case that Ring, the rear brakeman on train No. 255, should have flagged the extra train that was following the train at the time said train No. 255 was standing at the depot in the city of Belleville, yet, unless you further believe from the evidence in this case that such failure to flag the said extra train upon the part of said Ring amounted to willful and wanton misconduct on his part, plaintiff would not be entitled to recover in this case, if you further believe from the evidence that the said W. A. Wing had no right to be upon said train at the time he received his fatal injuries."

Another of said instructions given for the appellant was as follows: "The court instructs the jury that if you believe from the evidence in this case that W. A. Wing, the deceased, had



no right to be upon the train No. 255, and had no right to ride on said train from East St. Louis to Belleville <sup>629</sup> at the time in question, then, under the law, he was a trespasser upon said train, and the defendant in this case is not liable for an injury occurring to said W. A. Wing while upon said train, unless such injury was the result of the willful and wanton misconduct of the servants of the defendant."

2. Whether, therefore, the deceased was a trespasser or not, the question remains whether there is evidence tending to show that he was killed through the wanton or reckless conduct of the appellant's employes, who were in charge of the trains whose collision caused his death.

The question whether a personal injury has been inflicted by willful or wanton conduct or gross negligence is a question of fact to be determined by the jury. In *Chicago etc. R. R. Co. v. Murowski*, 179 Ill. 77, 88, 53 N. E. 572, 573, we said: "Whether the defendant was guilty of willful or wanton conduct or gross negligence was purely a question of fact for the jury to determine from all the evidence, introduced by the respective parties, bearing upon that point in the case, and it was not the province of the court to inform the jury that some particular fact in the case was conclusive of that question": See, also, *Odin Coal Co. v. Denman*, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131; *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692.

It is not always easy to define what degree of negligence the law considers equivalent to a willful or wanton act. The character of an act as being willful or wanton is greatly dependent upon the particular circumstances of each case. In the case of an injury to a trespasser, a railroad company has been said to be liable for "such gross negligence as evidences willfulness": *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112. Such gross negligence as evidences willfulness is "such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness." It is <sup>630</sup> such gross negligence as to imply a disregard of consequences or a willingness to inflict injury: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692.

To constitute willful and wanton negligence, it is not always necessary to prove that the defendant's servants are actuated by

ill-will toward the plaintiff. In *East St. Louis etc. Ry. Co. v. O'Hara*, 150 Ill. 580, 585, 37 N. E. 917, 919, we said: "If it be true, as the evidence tends to show, that the defendant's servants, at the time plaintiff was injured, were running their engine in the dark, without a headlight, or a bell ringing, and at a high and dangerous rate of speed, along a much frequented street, and where many persons were likely to be passing on their way to the ferry landing or otherwise, such acts would be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law to wanton and willful negligence. And it was not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill-will, directed specifically toward the plaintiff, or to have known that he was in such position as to be likely to be injured."

In *Elgin etc. Ry. Co. v. Duffy*, 191 Ill. 489, 492, 61 N. E. 432, we said: "The declaration charges the defendant with willfully and maliciously inflicting the injury. If the record discloses any evidence tending to support that averment, negligence on the part of the appellee, if conceded, would not excuse the appellant: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692. The evidence tends to prove that the train was going at a high rate of speed around a sharp curve, where the view was obstructed by an embankment, approaching a street which was much traveled, giving no warning by the ringing of the bell or sounding the whistle, and this testimony, without passing upon its weight or whether it was overcome by other evidence, tended to prove the charge of willfulness and wantonness <sup>631</sup> in the management of the train. The jury might well have based its verdict upon that theory of the case."

In *Odin Coal Co. v. Denman*, 185 Ill. 413, 418, 76 Am. St. Rep. 45, 57 N. E. 192, we said: "'Willful' is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent."

In *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 502, 55 N. E. 131, 134, we said: "Where an owner, operator or manager

so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions and willfully disregards the safety of miners employed therein."

Thompson in his *Commentaries on the Law of Negligence*, volume 1, section 21, defines willful negligence to be "a willful determination not to perform a known duty." The same author says: "The true conception of willful negligence involves a deliberate purpose not to discharge some duty, necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed upon the person by operation of law": *Thompson on Negligence*, section 20. He also says: "An entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care, with the consequences of a willful injury": *Thompson on Negligence*, sec. 22.

The court gave for the appellant, at its request, upon the trial below the following instructions:

"1. The court instructs the jury that the plaintiff in this case is not entitled to recover, unless you believe <sup>632</sup> from the preponderance of the evidence in the case that the servants of the defendant in charge of the trains in question, or some of them in charge of said trains, were at the time guilty of willful and wanton misconduct, and that such willful and wanton misconduct resulted in, and was the cause of, the death of the said W. A. Wing.

"2. The court instructs the jury that the mere violation of a city ordinance, regulating the rate of speed of a train through a city, or the rules of the railroad company with reference to the management of its trains, does not of itself amount to a willful and wanton misconduct."

"4. The court instructs the jury that, even if you believe from the evidence in this case that the servants of the defendant in charge of the extra train that followed train No. 255 at the time in question ran said train at a greater rate of speed than was permitted by the ordinance of the city of Belleville, and did not have said train under control, as required by the rules of the company, such neglect and failure, upon the part of the servants in charge of said train, would not entitle plaintiff to recover in this case, unless you further believe that such failure to comply with said ordinance and rules of the company

with reference to the speed of said train amounted to willful and wanton misconduct on the part of such servants.

"5. The court instructs the jury that what is meant by willful and wanton misconduct is such conduct as amounts to an intentional wrong, or of such a reckless character, as shows that the person or persons, guilty of such misconduct, were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons."

In its own instruction, the appellant thus defines willful and wanton conduct as being conduct "of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such <sup>633</sup> a manner as shows that they had an utter disregard for the safety and lives of other persons." A careful examination of the testimony in this case will reveal the fact that there was sufficient evidence, tending to prove such wanton and willful misconduct on the part of the servants in charge of these two trains, as to justify a submission of the question to the jury; and, of course, the finding of the jury is conclusive upon the court.

As has already been stated, freight train No. 255, in the caboose of which the deceased had taken passage and had gone to sleep, left the city of East St. Louis at 12:40 and reached the depot in the city of Belleville at 3:20. It remained stationery at the depot for twenty minutes, and until the hour of 3:40 in the morning of January 12th, at which time the collision occurred. This train No. 255 was a regular, or timetable, train, and was entitled to the right of way.

Another freight train, called the "extra" train, left the city of East St. Louis at 3 o'clock on the morning of January 12th, and reached the depot in the city of Belleville upon the same track on which freight train No. 255 stood, and collided with the latter train at 3:40. This extra train consisted of thirty-four cars, and was drawn by two engines. Nineteen of the thirty-four cars were equipped with air-brakes. The engineer, Pope, who was in control of this extra train, knew, when the train left East St. Louis at 3 o'clock in the morning, that freight train No. 255 had preceded his train, and was traveling on the same track, and going in the same direction, but he had no knowledge where train No. 255 was. It must have been known, when the extra train started from East St. Louis, or ought to have been known, in the train dispatcher's office, that train No. 255 had not yet reached Belleville. Although the



time usually consumed by a freight train in the journey from East St. Louis to Belleville was one hour, yet this extra train was traveling so rapidly that it reached the depot in Belleville, <sup>634</sup> where the collision took place, within forty minutes from the time it left East St. Louis, although it made two stops on the way, one at what is called the "belt," and the other for the purpose of taking on coal. The proof shows that, under the ordinances of Belleville, freight trains were forbidden to travel faster than six miles an hour, and that this fact was known to the engineer of the extra train. Yet that train, when it reached the western limits of the city of Belleville, and after it entered the limits, was traveling at the rate of thirty miles per hour, with two engines and thirty-four cars. The population of the city of Belleville is twenty thousand inhabitants. It is four thousand one hundred and fifty-seven feet from the Belleville and Southern depot controlled by appellant, where this collision occurred, to the western limits of the city of Belleville, which is in the direction of the city of East St. Louis. From the western limits of the city to this depot there is an exact fall in grade of thirty-nine and fifty-eight one-hundredths feet. At what is called Centreville avenue, at a distance of one thousand five hundred and twenty-three feet west of the depot, there is a sharp curve, and, on account of this curve and the houses adjacent thereto, it is impossible to see a train at the depot until this curve is reached, and there is a fall in the grade of one foot to every one hundred feet from that point to the depot. When the extra train reached this curve, which was only fifteen hundred and twenty-three feet from the depot, it was traveling at the rate of twenty to twenty-one miles an hour. Not until it reached this point did the engineer, Pope, see the red light in the darkness of the night upon the rear end of train No. 255, which stood at the depot. He then attempted to curb the speed of the train, but was unable to lessen its speed to any considerable extent. Accordingly, when the extra train struck train No. 255 at 3:40 A. M., the former was traveling at the rate of fifteen miles per hour. It took only thirty-five seconds to go from the curve to the depot. The engineer on the extra train, Pope, seeing the collision inevitable, leaped from the engine, and saved his life. The train was traveling <sup>635</sup> at such a rapid speed that, when it struck train No. 255, the thirty loaded cars of the latter train were knocked forward four or five lengths, and the extra train telescoped or went through the

caboose and five loaded cars, and the front engine of the extra train, when it finally came to a stop, was standing on its rear wheels. Wing, who was asleep in the caboose of the train, was killed instantly. Not only was the extra train traveling at a greater rate of speed than was allowed by the ordinances of Belleville, to wit, six miles an hour, but it was traveling in violation of the rules of the company, which were well known to the engineer operating the train. One of those rules was as follows: "All second and inferior class trains, including extras and following sections of first-class trains, must approach timetable stations under control, expecting to find main track occupied. This does not excuse trains, when detained at stations, from flagging, as provided in rules 96 to 99, inclusive." Another rule of the company was as follows: "Second and inferior class trains must run carefully through the yard limits at East St. Louis and Belleville, expecting to find the main track occupied. In case of accident the responsibility rests with the approaching train." The extra train here was a second and inferior class train. Belleville was a time-table station, and the engineer of the extra train found the main track occupied by freight train No. 255. The rules of the company required him to run his train carefully through the yard limits at Belleville upon the theory that the main track would be occupied. Instead, however, of running his train carefully, and with the expectation of finding the main track occupied, he was running it for a long distance within the city limits at the rate of thirty miles an hour in the darkness of the night, and when he reached the distance of fifteen hundred and twenty-three feet from the depot, was running at the rate of from twenty to twenty-two miles an hour, and thereafter at the rate of fifteen miles an hour. Not only did the engineer on the <sup>636</sup> extra train know the rules above mentioned, and the ordinances of the city limiting the speed of the train, but he knew that there was a steep downgrade from the city limits to the depot, and that there was a sharp curve at Centreville avenue fifteen hundred and twenty-three feet west of the depot, and that a train at the depot could not be seen even in the daytime until Centreville avenue was reached.

As to the servants of appellant, who were in charge of train No. 255, the following state of facts is shown by the evidence: Carnes, the conductor of this train, knew before he left the city of East St. Louis at 12:40 on the morning of January 12th,

that this extra train was to leave East St. Louis at 2:30 o'clock on that morning. As a matter of fact, the extra train did not leave East St. Louis until 3 o'clock. When train No. 255 arrived at the depot in Belleville at 3:20 in the morning, Carnes, the conductor, knew that an extra train was to leave East St. Louis at 2:30, and that in the ordinary course of travel it would reach the depot at Belleville at 3:30, in one hour. He was told by the trainmaster at East St. Louis that this extra train would leave that city at 2:30 A. M. He knew, as well as Pope, that there was a sharp curve fifteen hundred and twenty-three feet west of where the caboose was standing, in which the deceased, Wing, was sleeping, and he knew that his train, No. 255, could not be seen by the extra train, coming behind it, until the latter reached the curve, and knew, moreover, that there was a very steep decline in the grade from the western limits of the city to the depot, but, notwithstanding all this, no effort was made to flag the oncoming extra train. There was a rule of the company, which required a flagman to be sent back three thousand six hundred feet when a train was detained at a depot ten minutes. In other words, as stated by the appellate court, "the rules of the company provide that, when a train is detained at a station for more than ten minutes, where the rear of the train cannot be plainly seen from a train moving in the same direction for a distance of one-half <sup>637</sup> mile, a flagman must go back a distance of three thousand six hundred feet and protect the train."

When train No. 255 arrived at the depot in Belleville at 3:20 A. M., Carnes, the conductor, and W. E. Ring, the rear brakeman, were in the caboose with the deceased, the latter being asleep. Carnes, the conductor, said to Ring, "Now, Ring, we have been a long time out of East St. Louis, and there was an extra ordered to leave there at 2:30. Keep your eyes open." And the brakeman replied, "All right." After the conductor made this remark to rear brakeman Ring, he got on top of the train and went forward. He went into the office to get orders, and the engineer went to sign the register. Train No. 255 remained longer than ten minutes at the depot. It remained twenty minutes, to wit, from 3:20 A. M. to 3:40 A. M., and the engineer expressed the fear that his engine would not be able to move the train. Yet, notwithstanding this lapse of time, the rear brakeman did not go back to flag the oncoming extra train, nor give it any notice that train No. 255 was standing upon the track

at the depot. The conductor failed to see that the brakeman performed the duty thus enjoined upon him by the rules of the company. If the extra train had been flagged in accordance with the rule of the company, the accident unquestionably would have been avoided. The conductor and brakeman and engineer in control of train No. 255 knew all the facts that have already been stated in regard to the impossibility of seeing a train at the depot from any point westward distant farther than fifteen hundred and twenty-three feet, and they also knew that there was a downgrade rendering it difficult to suddenly stop a long train. The conductor, and Ring, the brakeman, also knew that Wing, the deceased, was asleep in this caboose, and must have known that he was liable to be killed in case the extra train collided with No. 255, and yet, notwithstanding all this knowledge, nothing was done toward flagging the extra train, and thereby trying to prevent a collision.

638 Under the state of facts here detailed, we are unable to say that there was no evidence, tending to show such wanton and willful misconduct as the jury were required to find in the given instructions in order to justify a recovery by the appellee. Certainly, in the language of the instruction asked by the appellant and given for it by the trial court, the servants of appellant, who were in control of these trains which collided, "were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons."

3. It is claimed by appellant that the deceased, Wing, was a fellow-servant with the employés of appellant in charge of the trains in question, and that for that reason appellant cannot be held liable. This objection appears not to have been made upon the trial in the court below, and no instruction was asked by appellant, or given by the court, embodying this theory of the case. Aside from this, however, it cannot be maintained that Wing was a fellow-servant of the employés in charge of the trains, for the reason that he was not at the time of the accident working for the appellant, but was riding on the train on his own business.

Certain authorities are referred to by counsel for appellant, which hold, as it is claimed, that an employé of a railway company, who is furnished free transportation to ride to and from his work, or, under the custom of the company, is carried free upon its trains to and from his work, is a fellow-servant with the employés of the company, who are engaged in operating



the train. Here, however, freight train No. 255 was not carrying Wing while he was engaged in the work of the appellant, but was taking him to his home to visit his family after his work for the appellant had ceased. Where a person in the employ of a railroad company travels back and forth from his home to the place where his services to the company are rendered on the cars of the company, and his transportation free of charge constitutes a part of <sup>639</sup> his contract for service, he is, while so traveling, not a passenger, and cannot recover for the injuries received on account of the negligence of the train crew, because he is a fellow-servant of the train crew, and assumes all the risks which they assume. But no such state of facts exists here. A shoveler of snow, while going to his work upon a train engaged in the work of removing snow from the track, was injured by the overturning of the car in which he was riding, through the negligence of the conductor, and, in such case, might be regarded as a fellow-servant with the conductor of the train crew. But, in such case, he and the train crew were both engaged in the same work for the company, the one in the work of shoveling snow, and the other in the work of removing the snow from the track. So, where a laborer, while riding on a gravel train to his place of labor, was injured by a collision caused by the negligence of the company's servants in charge of the train, he was held to be a fellow-servant with the train crew; but, in such case, he and the train crew were both engaged in a common service in behalf of the company. No such state of facts exists in the case at bar.

On the contrary, in the case of *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9, 23, 81 Am. Dec. 336, we said: "The evidence shows that defendant in error, when he received the injury, was going from his residence to Trenton or Summerfield, to purchase flour. He was in the pursuit of his own business, and not that of the company. Whatever might have been his former relations with the company, he was then engaged in his own business. He was at that time in the situation of any other stranger to or passenger upon the road, liable to no greater burdens, nor entitled to more privileges, than any other passengers similarly situated. He had no control over the running of the train, was not then engaged in the business of the company, and was, as far as this record discloses, free from all negligence, and was in nowise responsible <sup>640</sup> for the injury, nor did his connection with the road in the remotest degree contribute to the misfortune."

4. Counsel for appellant complain of certain remarks made to the jury, in his address to them, by counsel for appellee. In these remarks counsel for appellee stated to the jury that appellee would submit no instructions to them, but that the instructions which would be read to them were those which had been asked by the appellant. This statement was literally true, but it was unnecessary to make it to the jury, and, when the attention of the court was called to it by counsel for appellant, counsel for appellee was directed to confine his argument to facts within the record. Counsel for appellee then said to the jury: "It is the sworn duty of the jury to consider the instructions offered, for the reason that, when passed upon by the court, and read to you by the court, they are the law governing the case, and they should be followed by the jury." It seems to us that this was a perfectly fair statement on the part of counsel for appellee, and that appellant could have suffered no injury from any remarks made by counsel for appellee upon this subject.

The judgment of the appellate court is affirmed.

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*A Railroad Company Owes the Duty* of ordinary care to any person who enters upon its trains as a trespasser, and is liable to him for injuries willfully or wantonly inflicted: *Enright v. Pittsburg etc. R. R. Co.*, 198 Pa. St. 166, 82 Am. St. Rep. 795, 47 Atl. 938; *Bolin v. Chicago etc. Ry. Co.*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911, and cases cited in the cross-reference note thereto. As to the duty owing to a person on a freight train, see *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583, and cases cited in the cross-reference note thereto.

*As to whether a Railway Employé* riding on free transportation is a passenger or a fellow-servant, see *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841, 40 S. E. 368; *Bowles v. Indiana Ry. Co.*, 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. Rep. 279, and cases cited in the cross-reference note thereto.

CASES  
IN THE  
SUPREME COURT  
OF  
INDIANA.

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HART v. SMITH.

[159 Ind. 182, 64 N. E. 661.]

**TAXATION—"Goodwill"—Constitutional Law.**—The "goodwill" of a newspaper business is not of itself property within the meaning of a constitutional provision requiring the legislature to provide for a uniform system of taxation of all property with certain exceptions. (p. 282.)

**"GOODWILL" of Business is not of Itself Property.**—It is an incident that may attach to, or in some cases be connected with, property. (p. 283.)

**TAXATION—Goodwill of Business.**—A general statute declaring that all property within the jurisdiction of the state, not expressly exempted, shall be subject to taxation, does not authorize the taxation of the goodwill of a newspaper business. (p. 285.)

**TAXATION—Goodwill of Newspaper,** conducted by individuals or copartnerships, is merely an incident of the business of a going concern, and as such business cannot be treated as a unit for the purposes of taxation, the goodwill thereof is not taxable. (p. 286.)

**TAXATION of Shares of Stock.**—If without fraud the state board of tax commissioners has determined that shares of stock have a value for the purposes of taxation, the courts have no power to review such conclusion. (p. 289.)

**JUDGMENTS.—Jurisdiction Existing,** any order or judgment is conclusive in respect of its own validity in a dispute concerning any right or title to be derived through, or anything done by virtue of, its authority. (p. 290.)

**TAXATION—Injunction.**—Courts may relieve by injunction from assessments laid without jurisdiction. (p. 291.)

**TAXATION—Injunction—Collateral Attack.**—In a proceeding to enjoin tax commissioners from taxing the goodwill of a business, the rule requiring that the infirmity appear from the face of the record in a collateral attack does not apply. (p. 292.)

**TAXATION—Partly Legal and Partly Illegal.**—If an assessment made by tax commissioners is in part legal and in part illegal, and the legal portion cannot be ascertained, the whole tax must be held invalid. (p. 293.)

**CONSTITUTIONAL LAW.**—Courts will not decide constitutional questions when they can perceive another ground upon which to properly rest their decision. (p. 293.)

W. L. Taylor, attorney general, M. Moores, C. C. Hadley, M. M. Hugg and F. McCray, for the appellants.

F. Winter and C. Winter, for the appellees.

**183** GILLETT, J. This suit involves the validity of an assessment for taxation, made, on appeal, by the state board of tax commissioners against appellees, Delavan Smith and Charles R. Williams, as partners, engaged in the publication of a newspaper, known as the "Indianapolis News," under the name and style of the Indianapolis News Company.

**184** The state board added to appellees' assessment of forty-seven thousand six hundred and fifty-seven dollars and thirty-one cents, based on their accounts and tangible personal property, the latter being itemized, the additional sum of three hundred and fifty-two thousand three hundred and forty dollars, without in any manner indicating what items, if any, it applied to, and it is charged, in effect, that said increased assessment was based on the goodwill of appellee's said business, and on its membership in a news gathering corporation, known as the Associated Press, which membership it may be inferred, although the allegations of the complaint are somewhat vague upon the subject, was based on appellees' ownership of eight shares of the stock of said corporation. It is not necessary to set out any further averments of the complaint, as the case, except as hereinafter mentioned, has been argued on the substantial question as to the authority of the state board in the premises. Appellants demurred to the complaint below, their demurrer was overruled, and they excepted. As they elected to abide their demurrer, and declined to plead further, a decree was rendered in appellee's favor.

We address ourselves first to the determination of the question whether the goodwill of the Indianapolis News Company is subject to taxation. The power of taxation is one of the highest attributes of sovereignty. When society erects a state, creating the three great departments of government—the legislative, the executive, and the judicial—it is not necessary to grant to the



legislative department the power of taxation; for, in the absence of other restriction, that authority vests in the legislative department by virtue of the general grant of legislative power: *State v. Smith*, 158 Ind. 543, 63 N. E. 25; *State Board etc. v. Holliday*, 150 Ind. 216, 49 N. E. 14. The constitution of Indiana ordains that, "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, <sup>185</sup> scientific, religious, or charitable purposes as may be especially exempted by law": Const., art. 10, sec. 1. This provision requires all property not especially authorized to be exempted to be taxed, but beyond it there is room for the abundant exercise of legislative authority. Indeed, the question as to the right to subject goodwill to the burden of taxation is not a question of legislative power, but a question of legislative will.

If it be granted that goodwill is property, yet it cannot be taxed unless the general assembly has authorized it. Notwithstanding the constitutional requirement as to the taxation of property, such provision is not self-executing, and a tax cannot be laid unless the general assembly selects the particular species of property to bear the burden of taxation: *Riley v. Western Union Tel. Co.*, 47 Ind. 511; *Hyland v. Brazil Block Coal Co.*, 128 Ind. 335, 26 N. E. 672; *State Board etc. v. Holliday*, 150 Ind. 216, 49 N. E. 14. So, in any event, the question is one of legislative intent. If, however, goodwill is property, and therefore ought to be taxed, then, in the construction of the legislative scheme of taxation, we ought to impute to the general assembly an intent to obey the constitutional mandate, if its enactments fairly admit of such a construction: *Orr v. Baker*, 4 Ind. 86; *Trustees etc. v. Ellis*, 38 Ind. 3; *Read v. Yeager*, 104 Ind. 195, 3 N. E. 856. We therefore proceed to an examination of the question whether goodwill is property. Despite the almost universal recognition at the present day of goodwill as in the nature of property, the law on this subject is of comparatively recent growth. The cases greatly confound the thing itself with the means of transferring it, and with the rights an assignee acquires in order to effect that transfer. There is a kind of local goodwill, that Lord Eldon characterized as "nothing more than the probability that the old customers will resort to the old place": *Crutwell v. Lye*, 17 Ves. 335, 346. Goodwill of this character may inhere in real property and give to it additional

value. As civilization <sup>186</sup> became more complex, the realization was forced upon the courts that the right to carry on an established business, and to represent that it is the old business that is carried on, is often a thing of value, since men were willing to pay for the privilege and contended for it at the forum, and therefore the courts have, by evolutionary processes, so adjusted themselves to conditions as to treat such privileges, even where not connected with real estate, as in the nature of assets. The trend of authority is that they will be so regarded and protected, not only where they are made the subject of express contract in connection with the voluntary sale or the bequest of a business, made in connection with the disposition of property, but, except where the business is of a purely personal character, depending for its existence solely upon the skill of the person carrying it on, that such interests will be protected in the winding up of partnership affairs and in cases of compulsory sales. On many questions relative to the disposition of these interests there is a most distressing conflict and uncertainty in the adjudged cases, and we have no disposition to tempt such a field. Some of the cases seem to treat goodwill as property, while in other cases courts have attained the result by the exercise of control over the assignor. In cases of voluntary transfers this seems eminently proper, since it is not honest to sell the custom and steal away the customers; to pocket the price, and then to recapture the subject of the sale: See *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, 21 Am. St. Rep. 442; *Trego v. Hunt*, (1896) App. Cas. 7.

We regard it as clear, however, that goodwill is not in and of itself property, but that it is an incident that may attach to, or, in some cases, be connected with it. In *Rawson v. Pratt*, 91 Ind. 9, 16, it was said: "‘Goodwill,’ as property, is intangible, and merely an incident of other property. It was not in this case an incident of the stock of hardware, tools, and machinery, which seem to have been <sup>187</sup> the only tangible property purchased by the appellants from the appellees." In our judgment, in a case of this kind the transfer of a goodwill, involving the right to carry on the old business and to represent that it is the old business that the purchaser is carrying on, is really based, not so much on the sale of the property that is itself conveyed, as it is upon the sale of the business as a going concern. This seems to be the view of the supreme court of the United States, as expressed in *Metropolitan Nat. Bank v. St. Louis Dis-*

patch Co., 149 U. S. 436, 446, 13 Sup. Ct. Rep. 944, 947, where it was said: "Undoubtedly, goodwill is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. . . . As applied to a newspaper, the goodwill usually attaches to its name rather than to its place of publication." Assuming these statements of the federal supreme court to be the law, as we are disposed to, and it will be realized how shadowy a thing a goodwill is in the case of a newspaper. As Professor Parsons said, in his work on Partnership, fourth edition, section 181: "The only proper signification of the word must be, that benefit or advantage which rests only on the goodwill, or kind and friendly feelings of others. . . . It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period, and been promoted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope, grounded on a probability."

In the case of a goodwill attaching to real property, the goodwill becomes an integral part of the value of such property, and, in the case of a corporation possessing a goodwill, the value thereof may find a reflex in the value <sup>188</sup> of its shares of stock. We hold, however, that the goodwill that attaches to the business of conducting a newspaper belonging to an individual or a copartnership is not, in and of itself, property within the meaning of the constitutional mandate; and while it might be taxed, since the law protects it, yet the a priori argument, that the constitution commands it to be taxed, is gone. We think that this is the proper doctrine in all such cases where goodwill does not inhere in particular, tangible property. We therefore approach the question whether, in the absence of a constitutional requirement that such an interest should be taxed, there is otherwise to be found in existing legislation language that, of its own force, warrants such conclusion.

Taxes are burdens that must necessarily be laid, and the government is not to be regarded as a public enemy in imposing them. Such laws ought not to be construed from the standpoint of the taxpayer alone or of the government alone. The real question is, What was the intent of the general assembly?

Whatever may be the rule in the construction of the federal revenue laws, where severe penalties and forfeitures are often attached, we think that, under a revenue system like ours, it is the duty of the courts, even in construing statutes providing for taxation that go beyond the constitutional requirement that all property shall be taxed, to construe such statutes without bias or prejudice, and that in such cases the courts should only lean toward strictness to the extent that it is justifiable on the ground that it is to be fairly and justly presumed that the general assembly, which possesses a power so comparatively unrestrained in its force and searching in its extent as the power of taxation, has so shaped the law as, without ambiguity or doubt, to bring within it everything that it was meant should be embraced: *United States v. Breed*, 1 Sum. 159, Fed. Cas. No. 14,638; *United States v. Sapinkow*, 90 Fed. 654; *Cooley on Taxation*, 2d ed., 273.

It is contended by the learned attorney general that the <sup>189</sup> assessment of goodwill is warranted, as property, under the general act concerning taxation. We have heretofore expressed our view that goodwill is not property in the ordinary sense of the term, but we proceed to examine the act itself. By such act the general assembly has provided for the taxation of polls and property. It is declared that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation": *Burns' Rev. Stats. 1901*, sec. 8410. The next section provides that personal property shall include certain described property, not mentioning goodwill. We think that this section, whereby the general assembly undertakes to define real and personal property for the purpose of taxation, affords strong evidence that it was not intended to tax goodwill in a case like this. The maxim, "*Expressio unius est exclusio alterius*," is quite applicable in view of the legislative definition. The entire act is silent on the subject of the taxation of goodwill, as an incident to personal property or otherwise, as applied to any such case as this; and the conclusion that goodwill, as such, is to be taxed could only be arrived at by interpreting the act with a mind bent on squeezing everything out of it that its words do not necessarily withhold. Certainly, as applied to a case not within the sweep of the constitutional requirement, this is not a justifiable method of interpretation.

As said by Mr. Justice Story, in *United States v. Wigglesworth*, 2 Story 369, 373, Fed. Cas. No. 16,690: "It is, as I conceive, a general rule in the interpretation of all statutes levying



taxes or duties upon subjects or citizens not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy." As more tersely expressed by Mr. Justice Nelson: "Duties are never imposed on the citizen upon vague or doubtful interpretations": *Powers v. Barney*, 5 Blatchf. 202, 203, Fed. Cas. <sup>190</sup> No. 11,361. This expresses the views of the courts generally: *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 7 Sup. Ct. Rep. 1240; *American etc. Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. Rep. 55; *Adams v. Baneroft*, 3 Sum. 384, Fed. Cas. No. 44; *Sewall v. Jones*, 9 Pick. 412; *Vicksburg etc. R. R. Co. v. State*, 62 Miss. 105; *Mayor etc. v. Hartridge*, 8 Ga. 23; *Dean v. Charlton*, 27 Wis. 522; *Gurr v. Schudds*, 11 Ex. 190; *Wroughton v. Turtle*, 11 Mees. & W. 561; *Williams v. Sangar*, 10 East, 66; *Denn v. Diamond*, 4 Barn. & C. 243; *Tompkins v. Ashby*, 6 Barn. & C. 541; *Oriental Bank v. Wright*, L. R. 5 App. Cas. 842; *Pryce v. Directors etc.*, L. R. 4 App. Cas. 197; *Daines v. Heath*, 54 Eng. C. L. 938; *Gosling v. Veley*, 64 Eng. C. L. 328, 407; *Potter's Dwarris on Statutes*, 255.

It would be against usage to tax the goodwill of a partnership or individual. It is to be presumed that the general assembly was familiar with the fact that it had been the practice to omit to tax goodwill in such cases, and, if it had been its purpose so to do in the enactment of the general tax law of 1891, the circumstances called upon that body to give clear expression to its purpose. Its omission in that particular can only be construed as an acquiescence in the practice that before obtained: *State Board etc. v. Holliday*, 150 Ind. 216, 49 N. E. 14. The reasons that we have thus far advanced against the construction of the taxation act that appellants contend for, may, in a substantial sense, be said to be a reiteration of the following language of Lord Denham, C. J., in *Burder v. Veley*, 12 Ad. & E. 233, 247: The law requires clear demonstration that a tax is lawfully imposed. No act of parliament vests in the parish officers such a power as these have exercised, or recites that such a power exists by common law or custom. No book of reports affirms it. No such usage in fact prevails in the land. An opposite usage prevails."

<sup>191</sup> Nor can we uphold the assessment as a tax on the property as a unit. In the case of a goodwill that is an incident of land, the increased value inheres in the property itself; and, in

the case of most domestic corporations, that which the law assesses—their stock—if worth more than their tangible property, stands for all that the corporation represents, including goodwill. It is provided by statute that, for the purpose of assessing property for taxation, a copartnership shall be treated as an individual: Burns' Rev. Stats. 1901, sec. 8423. In either case the schedule contemplates that the various items shall be assessed separately. Even if goodwill were regarded as an incident of personal property, it cannot be said that any one item of such property—as, for instance a printing-press—is worth any more because it belongs to one person than if it belonged to another. If there is a goodwill that can be said to be an incident of personal property at all, it must be an incident of the assembled items of personal property that may be said to constitute the tool or implement wherewith the business is carried on, and our revenue law cannot be tortured into a construction that authorizes an aggregating of personal property. Such property, upon the plain reading of the schedule, is required to be distributed among the appropriate items thereof. The goodwill of a newspaper, conducted by an individual or copartnership, is an incident of the business as a going concern, and, as the business cannot be treated as a unit, it follows that this is a case where the general assembly has omitted to provide a regulation whereby goodwill can be taxed: *State Board etc. v. Holliday*, 150 Ind. 216, 49 N. E. 14. The case of *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. Rep. 305, on petition for rehearing, 166 U. S. 185, 17 Sup. Ct. Rep. 604, cited by appellants' counsel, is not in point. That case settles the proposition that it is competent, under statutory authority, to tax <sup>192</sup> as a unit a going concern, yet the case really depends upon the fact that the state has enacted such legislation.

As to the element of appellees' holding of shares of stock in the Associated Press, we are of opinion that if the case rested alone upon the complaint that appellees' shares therein were taxed, no case would be presented for our interference. We do not doubt, if a number of newspapers enter into an agreement that each will provide the others with news, or that through a common agency such news is to be supplied to all, that the right under such contract is not a subject of taxation under existing statutes. Just what connection, if any, the shares of stock that appellees hold has with the privilege of re-

ceiving news, does not appear; and we are not advised as to what service, if any, appellees perform as payment, in whole or in part, for the advantage that they receive. The fact, as pleaded, that the court of last resort in the state where such corporation is organized has held that it is bound to furnish its news to all who apply, on the same terms that it exacts from its members, may be an important element tending to depreciate the value of such stock; but we cannot therefore say that the stock has no value, since a person who had regularly acquired stock in the corporation might thereby without contest receive the attendant privilege upon the terms fixed, while an outsider might have to vindicate his right, if any, by a long contest in the courts.

Section 8410 of Burns' Revised Statutes of 1901, that is quoted above, provides that all property within the jurisdiction of this state not expressly exempted shall be subject to taxation. The next section contains a definition of personal property for the purposes of taxation, and among other items of personal property therein mentioned is included "all shares in foreign corporations, except national banks, owned by inhabitants of this state." The listing of such shares is also provided for by the schedule: Burns' Rev. Stats. 1901, secs. 8460, 8463. Mr. Cook, in his valuable work on Corporations, fourth edition, volume 2, <sup>193</sup> section 565, says: "It is undoubtedly within the constitutional power of the legislature of a state to enact a statute that persons residing in that state, who are stockholders in a corporation created by another state, shall be taxed on their shares of stock at their residence within the former state. This principle of law is based on the fact that shares of stock are personal property; that they are distinct from the corporate property, franchises, and capital stock; that they follow the domicile of their owner like other personal property, and that consequently he may be taxed therefor wherever he may reside. It accordingly is a question of policy and expediency with a state whether or not it will tax its citizens who are stockholders in foreign corporations."

It is not material that the shares of stock, as such, do not directly earn money. If the holding of such shares is the basis of a privilege that in and of itself is worth money, we see no reason why such value should not inhere in such shares. The fact that the right, if any, the stock represents cannot be transferred without the consent of the Associated Press may take

from the stock a market value, but it may have a value nevertheless. Section 8458 of Burns' Revised Statutes of 1901 provides that in determining the value of personal property the township assessor "shall be governed by what is the true cash value, such being the market or usual selling price at the place where the property shall be at the time of its liability to assessment, and if there is no market value, then the actual value." We take it, however, that counsel for appellee would not dispute the proposition that if the shares of stock have any value they are subject to taxation. Counsel evidently rely upon the averment that the shares of stock "have no market value and no actual value." If this were true, we admit that such shares ought not to be taxed. But whether they had or no is a question of fact that the state board—a body having quasi judicial <sup>194</sup> powers—was required to determine; and if, without fraud, that body has determined that such shares had a value, then this court has no power to review such conclusions: *Pittsburgh etc. R. Co. v. Backus*, 133 Ind. 625, 653, 33 N. E. 432, 154 U. S. 421, 14 Sup. Ct. Rep. 1114; *Youngstown Bridge Co. v. Kentucky etc. Co.*, 64 Fed. 441; *McLeod v. Receveur*, 71 Fed. 455; *State Railroad Tax Cases*, 92 U. S. 575, 610; *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553.

As said by Mr. Justice Magruder, in *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, 12, 58 N. E. 418: "The determination of the value to be fixed on property liable to be assessed 'is not, in the absence of fraud, subject to the supervision of the judicial department of the state.'" The state board may have made a mistake of fact in determining the value of such shares of stock, but we cannot relieve on that ground alone. In *McLeod v. Receveur*, 71 Fed. 455, an assessment by said board was attacked on the ground that a bridge over the Ohio river was assessed at two hundred thousand dollars, when its real value, in so far as it was within the state of Indiana, was only forty-five thousand dollars. It was further alleged that such assessment was made by the state board by mistake and misrepresentation as to the southern boundary of the state at that point. In disposing of the question the court said: "Here there is no suggestion of fraudulent conduct upon the part of the board of equalization. Its officers were charged with the duty of assessing the value of the property of the bridge company lying within the state of Indiana. They did not seek or attempt to make any assessment upon property without the boundaries of the state. It was their



duty to ascertain the extent of the property of the bridge company lying within the state, and to declare its fair value. It is, in effect, charged that they committed an error of judgment, being misled to believe that the boundary line of the state was below low-water mark in the Ohio river, and so placed upon the property lying within <sup>195</sup> the state a greater valuation than they otherwise would have done; in other words, that, through a mistake of fact and error of judgment, the property of the bridge company lying within the state was excessively valued. The board of equalization had, however, jurisdiction of the subject matter, and, as observed by Chief Justice Ryan, 'had jurisdiction to commit the error'; and its determination, however erroneous, cannot be impugned collaterally. Jurisdiction existing, any order or judgment is conclusive in respect of its own validity in a dispute concerning any right or title to be derived through, or anything done by virtue of, its authority. It is true that, with respect to these special tribunals for assessment of property, evidence of excessive valuation is sometimes admitted; but it is so received in connection with other testimony to establish a charge of fraudulent conduct on the part of the board." Judge Showalter dissented in the above case on the ground that the state board had no jurisdiction to assess property in Kentucky, but the case probably rests on the ground, expressed in the opinion, that the board "did not seek or attempt to make any assessment without the boundaries of the state."

The questions involved in this case that have been argued by the respective parties have been questions that went to the merits of the right of the state board of tax commissioners to tax the appellees, and, as the parties stand in the attitude of waiving all other questions, we have been disposed to consider, so far as we could properly do so, the substantial questions in the case, but it is insisted by an *amicus curiae*, who, by leave of court, has filed a brief, that the effort of such board to tax the goodwill of appellees' business ought also to be upheld, because this proceeding is a collateral attack on the action of the board. Although such board is composed of men who, for the most part, otherwise occupy high official station, and although such board performs duties of very great importance to the <sup>196</sup> state, yet such tribunal is nevertheless one of granted powers; and, if it acts without jurisdiction, the courts have power to arrest the consequences of its acts. In *State Board etc. v. Holliday*, 150 Ind.

216, 49 N. E. 14, this court sustained a proceeding to enjoin the state board from listing and valuing the life insurance policies for taxation that were held by the appellees in said action. In *Senour v. Ruth*, 140 Ind. 318, 321, 39 N. E. 946, 947, this court, in answer to the claim that the appellee therein was precluded by the action of the county board of review, said: "When we have found that the property was not within the jurisdiction of the state, we have found the absence of an element necessary to the validity of the board's action, and, in such case, the action is void, and may be attacked collaterally." The proposition that courts may relieve from assessments laid without jurisdiction finds support in the authorities without this state: *Santa Clara County v. Southern Pac. R. R. Co.*, 118 U. S. 394, 6 Sup. Ct. Rep. 1132; *Central Pac. R. R. Co. v. California*, 162 U. S. 91, 114, 16 Sup. Ct. Rep. 766; *St. Mary's Gas Co. v. Elk County*, 191 Pa. St. 458, 43 Atl. 321; *Keokuk etc. Bridge Co. v. People*, 161 Ill. 132, 43 N. E. 691; *Maxwell v. People*, 189 Ill. 546, 59 N. E. 1101; *Montis v. McQuiston*, 107 Iowa, 651, 78 N. W. 704; *Poe v. Howell* (N. Mex.), 67 Pac. 62; *State v. Ernst* (Nev.), 65 Pac. 7. In *Central Pac. R. R. Co. v. California*, 162 U. S. 91, 114, 16 Sup. Ct. Rep. 766, the supreme court of the United States said: "Undoubtedly, if the board of equalization had included what it had no authority to assess, the company might seek the remedies given under the law to correct the assessment, so far as such property was concerned, or recover back the tax thereon, or, if those remedies were held not exclusive, might defend against the attempt to enforce it." Judge Cooley recognizes that the courts may relieve from an assessment when some principle of law is violated in making it, and when the complaint is not merely <sup>197</sup> of an error in judgment: *Cooley on Taxation*, 748, 777, and notes on 750, 776.

We think that in a case of this kind it is not proper to apply the rule that obtains when a judgment of a court of general jurisdiction is collaterally attacked—that the infirmity must appear on the face of the record. These proceedings are summary and, to a large extent, informal, and there are no pleadings that tend to make the question decided certain. It is proper, in a case like this, where values have not been extended on the specific items of the taxpayer's schedule, to show affirmatively that he was assessed with an item that was not taxable under the laws of the state. This could be done without contradicting in any way the record that the board made, if we

may assume that the averments of the complaint are true. The following cases, by implication, at least, support this view: Pittsburgh etc. R. R. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. Rep. 1114; Central Pac. R. R. Co. v. California, 162 U. S. 91, 112, 16 Sup. Ct. Rep. 766; People v. Central Pac. R. R. Co., 105 Cal. 576, 38 Pac. 905.

In Santa Clara Co. v. Southern Pac. R. R. Co., 118 U. S. 394, 6 Sup. Ct. Rep. 1132, the question was whether the state board of California had included within the assessment of defendant in error certain fences along its right of way that the board had no power to assess against it. No record of the assessment as made by the board was introduced, and no other documentary evidence of such assessment was offered, except the official communication of said board to the local assessor, which showed only the aggregate valuation of the company's franchise, roadway, roadbed, rails and rolling-stock. The trial court made a special finding, in which it found that said board "did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said railway and the land of coterminous proprietors." 198 In passing upon the question thus presented the supreme court, at page 415, 118 U. S., and page 1142, 6 Sup. Ct. Rep., said: "It appears, as stated, from the evidence, that the fences were included in the valuation of the defendants' property; but under what head, whether of franchise, roadway, or roadbed, does not appear. Nor can it be ascertained, with reasonable certainty, either from the assessment-roll or from other evidence, what was the aggregate valuation of the fences, or what part of such valuation was apportioned to the respective counties through which the railroad was operated. If the presumption is, that the state board included in its valuation only such property as it had jurisdiction under the state constitution to assess, namely, such as could be rightfully classified under the heads of franchise, roadway, roadbed, rails, or rolling-stock, that presumption was overthrown by proof that it did, in fact, include, under some one or more of those heads, the fences in question. It was then incumbent upon the plaintiff, by satisfactory evidence, to separate that which was illegal from that which was legal—assuming, for the purposes of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty of tendering, or enabling the court to render judgment for, such amount, if any, as was

justly due." It was further held by the court that the whole assessment was invalid, as it could not be determined what was the amount of that part of the assessment that was valid.

It is our conclusion, as it is alleged that the goodwill of appellees' business was assessed, and as there is no means of determining the amount of that portion of the increase that the state board of tax commissioners had authority to add, that the action of said board as an entirety, in so far as it added to appellees' assessment, was properly held to be invalid.

Appellees, counsel have argued the question as to an unlawful discrimination against appellees in the administration <sup>199</sup> of the tax laws. It is settled that the court will not decide a constitutional question when it can perceive another ground on which it can properly rest its decision. We therefore decline to consider this question.

Judgment affirmed.

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*The Goodwill* of a business or a concern is the benefit or advantage accruing to it, in addition to the value of its property, derived from its reputation for promptness, fidelity and integrity in its transactions, from its mode of doing business, and other incidental circumstances, in consequence of which it acquires general patronage from constant and habitual customers: *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748. It is the chance of probability that custom will be had at a certain place of business in consequence of the way that business has been conducted: *Vonderbank v. Schmidt*, 44 La. Ann. 264, 32 Am. St. Rep. 336, 10 South. 616. For other authorities discussing the nature of goodwill, see *Slack v. Suddoth*, 102 Tenn. 375, 73 Am. St. Rep. 881, 52 S. W. 180; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 68 Am. St. Rep. 403, 50 N. E. 509; *Kramer v. Old*, 119 N. C. 1, 56 Am. St. Rep. 650, 25 S. E. 812.

*The Authority to Impose Taxes* is in its nature legislative, but is subject to the power of the courts to determine in particular cases whether the extreme boundary of legislative power has been reached and passed: *Board of Education v. State*, 51 Ohio St. 531, 46 Am. St. Rep. 588, 38 N. E. 614. Equity will interfere, in a proper case, with the action of assessors and boards of equalization: *Andrews v. King County*, 1 Wash. 46, 22 Am. St. Rep. 136, 23 Pac. 409.



## DAVIS v. CHASE.

[159 Ind. 242, 64 N. E. 88, 853.]

**ATTORNEY AND CLIENT—Forbidden Contracts.**—A contract between attorney and client under which the attorney agrees to prosecute a suit for a certain percentage of the amount recovered, and the client agrees not to enter into any compromise of the claim unless such attorney is present and directs the settlement, is void as against public policy. (p. 296.)

**PLEADING—Contract.**—Under a complaint counting on a special contract, there can be no recovery on an implied contract. (p. 296.)

**PLEADING — Collusion — Abatement.**—If cross-complainants are necessary or proper parties to the original action, the fact that they were made parties through collusion with the original plaintiff is no ground for abatement of the action. (p. 297.)

**FRAUDULENT CONVEYANCES—Pleading.**—A complaint to set aside a fraudulent conveyance, containing no averment as to the financial condition of the defendant at the time of the commencement of the action, except that he had no property subject to execution of which plaintiff has any knowledge, is wholly insufficient. (p. 297.)

D. C. Justice, E. B. Sellers and E. Uhl, for the appellants.

C. E. Spencer and M. A. Ryan, for the appellees.

**243** GILLETT, J. The appellee Chase filed in the court below his complaint in three paragraphs, founded upon a written contract executed by himself and the appellant John D. Davis; and he also sought by said action to subject to the payment of his demand a tract of real estate that it was alleged that said John had fraudulently caused to be conveyed to his wife, the appellant, Elizabeth Davis. Said first-mentioned contract is of the following tenor:

“This agreement, made and entered into the day and year last  
**244** written, by and between John D. Davis, party of the first part, and George P. Chase, party of the second part, witnesseth: Whereas, John D. Davis has this day employed George P. Chase, party of the second part, to institute and prosecute a suit or cause of action for the purpose of obtaining his share of his father John Davis’ estate, and the said John D. Davis hereby authorizes and empowers the said George P. Chase to recover said claim, either by suit or compromise, but that said George P. Chase shall not accept any compromise or settlement unless the same is satisfactory to the said John D. Davis: Now, therefore, in consideration of the said George P. Chase performing said services, the said John D. Davis agrees to pay to the said

George P. Chase, as compensation for his services, a sum of money equal to fifty per cent of any amount that he may recover, either by way of suit or compromise, and the said John D. Davis hereby expressly agrees not to enter into any compromise or accept any sum of money in settlement of said claim unless said George P. Chase is present and directs said settlement. Witness our hands this twenty-third day of February, 1898.

(Signed) "J. D. DAVIS.

"GEORGE P. CHASE."

Mr. Greenwood, in his work on Public Policy, at page 474, says: "A contract by which the control of the party in interest over litigation carried on in his behalf is limited, is void." This view finds full support in the cases. In *Lewis v. Lewis*, 15 Ohio, 715, the court said: "A contract with an attorney to prosecute a suit containing a stipulation that the party should not have the privilege to settle or discontinue it, without the assent of the attorney, would be so much against good policy that the court would not enforce it." In *North Chicago St. R. R. Co. v. Ackley*, 171 Ill. 100, 112, 49 N. E. 222, the supreme court of Illinois, speaking by Phillips, C. J., said: "The second proposition to be determined is, Is a contract by which the person in whose name the action is brought, <sup>245</sup> and to whom it belongs, restricted from compromising or settling such claim because of a contract to that effect? In other words, is such a contract valid and binding? . . . Whether a cause of action exists, and if so, its nature and amount, are facts always involved in uncertainty, and a defendant has a right to buy his peace. The plaintiff has a right to compromise, and avoid the anxiety resulting from a cause pending to which he is a party. Any contract whereby a client is prevented from settling or discontinuing his suit is void, as such an agreement would foster and encourage litigation." The supreme court of Arkansas has thus expressed itself upon the subject: "It is a wise public policy to allow the parties to a lawsuit, or to disputes that have not even progressed to the proportion and dignity of a lawsuit, to settle their differences without hindrance from disinterested parties. Parties should be permitted to beg or buy their peace at any time. It would be difficult to estimate the monstrously unjust consequences that might result to parties willing and ready to settle a demand of this kind, if it lay in the power of an attorney to impede or control such settlement": *Davis v. Webber*, 66 Ark. 190, 198, 49 S. W. 822,

74 Am. St. Rep. 81. "The law," said Judge Dillon, in deciding the case of *Ellwood v. Wilson*, 21 Iowa, 523, "encourages the amicable adjustment of disputes; and a construction of a contract which would operate to prevent the client from settling will not be favored." To the same effect, see *Boardman v. Thompson*, 25 Iowa, 487.

Counsel for appellee Chase do not attempt to dispute the correctness of the doctrine that the above authorities announce, but they seek to parry its force by contending that the agreement of the client not to compromise only required that the attorney should be present to advise the client in the effecting of a settlement. The verb "directs" ordinarily implies a pointing out with authority, or directing as a superior. If that is not the meaning of the word in the contract under consideration, and if it means only to guide <sup>240</sup> or advise, we do not understand why the client was required to "expressly" agree that in the event of a compromise his attorney should be present to guide or advise him. And it is still more difficult to understand why, if the settlement took the course that the contract contemplated it might take—of an acceptance of a sum of money by the client in settlement of the claim—it was so important to himself to have his attorney present to advise him that he must needs "expressly" bind himself in advance that he would not settle unless his attorney—and that particular attorney—was present to advise about such a comparatively simple matter as the receiving of a sum of money, and the execution of a receipt or a quitclaim deed. The theory of counsel is weak. It is evident that the purpose of the provision was to enable the attorney to prevent the client from making a settlement or compromise that the attorney might regard as disadvantageous to himself. It is plain that the provision, when construed according to the evident intent of the parties, is against public policy, and that there can be no recovery upon the contract sued on. As said in *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822: "This clause was fatal to the entire contract. It is not severable from it. It seems to have been an inducement for entering upon the contract. It is impossible for us to say that the parties would have entered upon the contract at all without this clause." The demurrer of appellants to each of the paragraphs of complaint of appellee Chase should have been sustained.

Counsel for said appellees are in serious error in asserting that under paragraphs of complaint counting on a special con-

tract there may be a recovery on an implied contract: Board etc. v. Gibson, 158 Ind. 471, 63 N. E. 982.

The appellees Kreider were judgment creditors of appellant John D. Davis, and were made parties defendant to the cause by appellee Chase after the case reached the court below on change of venue. Said appellees Kreider entered their voluntary appearance to the action, and filed <sup>247</sup> a cross-complaint, in which they sought to recover on their judgment, as a cause of action, against appellant John D. Davis, and to have said land subjected to the payment of their judgment. The appellants appeared specially to the cross-action, and filed a plea to the jurisdiction of the White circuit court, alleging that at the date of the commencement of the cross-action, and at the date of the commencement of the original action, they were residents of Carroll county, Indiana, and that by collusion between the original plaintiff and said cross-complainants the latter had been made parties to the action for the purpose of enabling them to file said cross-complaint. As the complaint of appellee Chase alleged that appellees Kreider were claiming some interest in or lien on the real estate which Chase was seeking to reach in the hands of Elizabeth Davis, we think that they were properly made defendants, to the end that their rights in the land might be settled before the court ordered a sale thereof. There might have been what the plea, by way of legal conclusion, styles "collusion" for the purpose of enabling the appellees Kreider to file a cross-complaint, and yet the averment does not exclude the idea that they were necessary or proper parties to the original action.

There was no error in sustaining a demurrer to the plea in abatement. Upon the sustaining of such demurrer, appellants each filed a demurrer to the cross-complaint. These demurrers were together overruled. The ruling was proper as to appellant John, but improper as to appellant Elizabeth. The cross-complaint does not contain any averment as to the financial condition of said John D. Davis at the time of the filing of the cross-complaint, aside from the allegation that he had no property subject to execution "of which these plaintiffs have any knowledge." This was insufficient.

The judgment of appellees Kreider against appellant John D. Davis is affirmed. The judgment in favor of appellee <sup>248</sup> Chase is reversed, with an instruction to the court below to sustain the demurrers of each appellant to each of said ap-



pellees' paragraphs of complaint, and the judgment as against appellant Elizabeth, based on the cross-complaint of appellees Kreider, is also reversed, with an instruction to sustain her demurrer to said cross-complaint.

MANDATE MODIFIED.

Per CURIAM. Upon a stipulation filed by appellants and appellee Chase, it is ordered that this court's mandate in the above-entitled cause be modified so as to read as follows: The judgment in favor of appellee Chase is reversed, with an instruction to the court below to restate its conclusions of law by declaring the contract sued on by him to be void and to render final judgment in favor of appellants against appellee Chase. The judgment of appellees Kreider against John D. Davis is affirmed, and the judgment of said Kreiders as against appellant Elizabeth is reversed, with instructions to sustain her demurrer to said Kreiders' cross-complaint, and to grant the latter leave to amend the same in the event that they apply for leave so to do.

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*Contracts Between Attorney and client* are considered in the monographic note to *Shirk v. Neible*, 83 Am. St. Rep. 159-187. A contract whereby a client agrees not to compromise the controversy without his attorney's consent is void as against public policy: See the monographic note to *Cameron v. Boeger*, 93 Am. St. Rep. 174, on the extent to which a litigant may control a cause in which he has appeared by attorney.

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CITY OF TERRE HAUTE v. KERSEY.

[159 Ind. 300, 64 N. E. 469.]

**MUNICIPAL CORPORATIONS—Taxation of Vehicles—Licenses.**—A municipal ordinance imposing a tax for the use of the streets by vehicles is not a tax on such vehicles as property, but is in effect a tax for the privilege of using vehicles on the streets. (p. 403.)

**MUNICIPAL CORPORATIONS—License of Vehicles—Police Power.**—A municipal ordinance licensing the use of vehicles upon the streets, which neither professes, nor is intended in any manner, to regulate or restrict the use of vehicles, its primary purpose being to impose a license tax as a revenue for the maintenance and repair of the streets, is not exercise of the police power. (p. 303.)

**MUNICIPAL CORPORATIONS—Power to License Use of Vehicles for Revenue.**—The power of a city to impose and enforce a license tax on vehicles using the streets, for the purpose of revenue

for the maintenance and repair of the streets, must be conferred by statute, and must be strictly construed. (p. 304.)

**LICENSE ON VEHICLES—Constitutional Law.**—Constitutional provisions for a uniform and equal rate of assessment and taxation do not apply to, nor prohibit, a tax for a license to use vehicles on the street of a city. (p. 305.)

**MUNICIPAL CORPORATIONS—Power to License Vehicles.**—Municipal corporations may be empowered by statute to impose a tax or license on vehicles used on the streets of a city, and when so empowered such license or tax may be imposed for the purpose of revenue for the maintenance and repair of such streets. (p. 308.)

**MUNICIPAL CORPORATIONS—Vehicle Licenses.**—Ordinances imposing a tax for a license to use vehicles upon the streets may properly be based upon the use to which such vehicles are put, rather than upon their value. (p. 308.)

P. M. Foley, for the appellant.

J. S. Jordan, R. B. Stimson and H. A. Condit, for the appellees.

<sup>301</sup> JORDAN, J. This appeal brings before us for review an ordinance adopted, and caused to be published, by the common council of the city of Terre Haute, Indiana, on January 7, 1899, imposing a license tax to be paid by the owners of certain vehicles used on the public streets of said city. The action was instituted in the lower court by William P. Kersey, in conjunction with his coappellees herein, six in number, suing for themselves and in behalf of five thousand others similarly situated, to enjoin appellant from enforcing against them the ordinance in controversy, for the reason that the same was wholly void, at least so far as the same concerned them. The complaint alleges and discloses that appellees are citizens of the United States, and taxpayers residing within the city of Terre Haute, and are the owners of various kinds of vehicles kept by them for their own use, health, pleasure, and profit, and not for the purpose of <sup>302</sup> carrying goods, passengers for hire, or for the purpose of renting the same, but that such vehicles are kept for their own private use; that all of said vehicles owned by them on April 1, 1898, had been duly listed and assessed for taxation under the general revenue laws of the state of Indiana. It is alleged that the use of the vehicles owned by appellees is necessary to their health and business, and that it is impossible to use them without entering upon and driving along and over the streets of said city; that the value of said vehicles varies from fifty cents to five hundred dollars. It is charged that the ordinance in question is not

uniform in its operation upon all persons in the same class, and that certain kinds of vehicles used upon the streets of the city are exempted from its operation, and that the ordinance is designed as a revenue measure, and would produce, if enforced, a revenue of fifteen thousand dollars; that it is not intended to correct any evil or abuse, or to preserve the peace, good order, or safety of society, or any part thereof. For these reasons, and the others hereinafter stated, appellees charge in their complaint: 1. That the ordinance is null and void because it deprives them of the free use of their property, and of the free use of the public streets of said city, in contravention of sections 1, 21, and 23 of article 1 of the state's constitution; 2. That it grants privileges and immunities to a class of citizens which it does not grant to appellees on the same terms and is, therefore, in violation of section 23 of said article of the constitution; 3. That it provides for an unequal and un-uniform taxation of property in violation of section 1 of article 10 of the constitution; 4. That it contravenes section 1 of the fourteenth amendment of the federal constitution, inasmuch as it serves to deprive appellees of their property and liberty without due process of law, and deprives them of the equal protection of the law. It is further charged that appellant, by and through its officers, is threatening to enforce the ordinance against appellees, plaintiffs below, by arresting and prosecuting them and <sup>303</sup> enforcing fines against them for the violation of said ordinance, etc.

A perpetual injunction is demanded against appellant and its officers to prevent them from attempting to enforce said ordinance. The trial court held the complaint sufficient on demurrer. Appellant filed its answer in one paragraph wherein it set out all of the ordinances of the city of Terre Haute which regulated the use of its streets and the use of vehicles thereon. It also set out all of the police regulations in regard to the streets and vehicles, and further averred that said city had ninety miles of improved streets, and if all persons liable under the ordinance were required to take out a license, the amount realized thereby would not exceed eight thousand dollars per annum; that to keep the streets in a good and safe condition for travel thereon, appellant was required to expend annually more than forty thousand dollars. The answer further discloses that the city of Terre Haute has a population of forty-five thousand, and has one hundred and thirty-three miles of

streets within its corporate limits. A demurrer was sustained to this answer, and, appellant refusing to plead further, the court rendered its judgment enjoining it from enforcing said ordinance against appellees, and from enforcing it against any and all persons similarly situated. Errors are assigned on these rulings of the court.

The ordinance in controversy is entitled, "An ordinance providing for a license upon vehicles drawn upon the streets of the city of Terre Haute, Indiana, providing penalties for the enforcement of the same," and is as follows:

"Be it ordained by the common council of the city of Terre Haute, Indiana:

"Section 1. That the owner of all vehicles used on the streets of the city of Terre Haute shall pay annually license fees as follows, viz.: 1. On each wagon or truck used for hauling boilers, engines, machinery, or safes, and drawn by four horses, four dollars; 2. On each wagon or truck used as above and drawn by two horses, two dollars; 3. On each wagon or truck <sup>304</sup> used for hauling brick, ice, coal, drawn by two horses, two dollars; 4. On each omnibus or tally-ho drawn by two horses, two dollars; 5. On each wagon drawn by four horses, and not used in the manner specified in clause one, three dollars; 6. On each wagon, cart, dray, truck, furniture car, delivery wagon, or sprinkling cart drawn by two horses or less, two dollars; 7. On each buggy, surrey, coupe, or sulky used for pleasure and drawn by one horse, one dollar; 8. On each hack, hackney, carriage, cab, barouche, buggy, driving-car, surrey and all vehicles drawn by two horses, two dollars; 9. On each bicycle or tri-cycle, one dollar; 10. On each vehicle drawn by one horse not before mentioned, one dollar; 11. On each two-horse vehicle not before mentioned, two dollars; 12. On each three-horse vehicle not before mentioned, three dollars; 13. On each four-horse vehicle not before mentioned, four dollars.

"Sec. 2. All vehicles used by persons living without said city in hauling ice, coal, brick, sewer-pipe, tiling, or in the peddling of milk over and upon the streets of the city of Terre Haute, Indiana, the sum of two dollars for each vehicle drawn by one or more horses. Persons who take out license under this ordinance after February 15th of each year shall pay pro rata for the balance of the year ending February 15th thereafter; provided, that every license issued after November 15th of each year shall be a license fee charged to one-fourth of the annual license fee charged in this ordinance.



"Sec. 3. That any person included in the provisions of this ordinance desiring to use the streets of said city shall pay, or cause to be paid, to the city treasurer for each vehicle the license fee as herein provided, and take his receipt therefor, and upon presentation of said receipt to the city clerk, the said city clerk shall issue a license to the owner of said vehicle. It shall be unlawful for any person or persons owning any vehicle included in the provisions of this ordinance to use the streets of said city without first securing a license as herein provided."

305 Section 4 provides that there shall be "kept conspicuously in view on each vehicle mentioned in the ordinance the registered number of such vehicle, so that the same can be easily read from the sidewalk," etc.

"Sec. 5. The fund derived from the license herein provided for shall be applied only to the maintenance and repair of the streets and alleys of the city of Terre Haute.

"Sec. 6. The owner of vehicles covered by the terms of this ordinance, shall, before obtaining his license as herein provided, be required to pay to the city of Terre Haute the license fee as required by this ordinance, and take and file the city treasurer's receipt for the same with the city clerk, accompanied by an application signed by himself in which he shall set forth a full description of the kind and character of the vehicle for which a license is desired, the name of the owner, and the use to which such vehicle is to be put. Thereupon said clerk, upon the delivery of such receipt, shall deliver to said owner a license covering the period for which payment has been made, together with the plates provided for in this ordinance. Said clerk shall receive out of said license fee the sum of ten cents for each license issued."

Section 7, among other things, provides for a transfer of the license from the original owner to the purchaser of the vehicle, and for the recording of the license in the record book kept for that purpose.

"Sec. 8. Any person, firm, or corporation who shall violate any of the provisions of this ordinance, or who shall after the fifteenth day of February of each year drive or propel or cause to be driven or propelled on any of the streets of the city of Terre Haute, any unlicensed vehicle which under this ordinance requires a license shall be fined in any sum not less than one dollar and not more than ten dollars."

Section 9 declares that the ordinance shall be in full force and effect from and after its passage and publication, and after February 15, 1899.

<sup>306</sup> It is apparent that this ordinance is not a model, either in the draft thereof, or in the language or terms therein employed, but its intention or purpose is evident, which is, as we interpret it, to subject the owner of the vehicles therein named to the payment of a tax for a license or privilege to use such vehicles upon the public streets of the city. The ordinance in effect, if not in terms, imposes a tax for the use of the city's streets by the means of the vehicles therein mentioned. It is not the vehicles, as articles of property, which are sought to be taxed by virtue of the ordinance, but it is the use thereof on the public streets. This proposition, we think, is made clear by the fact that owners of vehicles might, without violating the ordinance, use them on their own premises or on the premises of their neighbors, or they might each or all manufacture and keep for sale any number of vehicles, without in either case being liable, under the ordinance, to the tax imposed. It is only when they use their vehicles on the streets of the city that they may be subjected to the payment of the annual tax for the privilege of such use. It is apparent that the ordinance neither professes nor is intended in any manner to regulate or restrict the use of vehicles, but the primary purpose thereof is to impose a license tax as revenue for the maintenance and repair of the streets. Therefore, appellant, in the adoption thereof, cannot be said to have been in the exercise of the police power, for the functions of the latter are not primarily the raising of revenue.

The authorities generally affirm that the power to tax, in a strict and proper sense, for the purpose of creating revenue, is not included within the police power of the state. However, it is true that the exercise of the latter power by a municipality may incidently conduce to create a revenue, and thereby benefit the public treasury. It follows, then, that if the validity of the ordinance can be upheld, it must be upon the ground that the adoption thereof is a legitimate exercise of a special taxing power conferred <sup>307</sup> upon it by the legislature. It is true, as a general proposition, that a license is frequently required or exacted under the police power of the state; but a special license tax, as is that in the case at bar, can only be imposed for revenue by virtue of the state's taxing power, and not by reason of the police power: 2 Dillon on Municipal Corporations, 4th ed., secs.

764, 768. If, however, the power conferred by the legislature upon appellant in the case at bar is not only to license and regulate vehicles, but the express authority is also given to tax them, or, rather to tax their use, then the question, under the circumstances, as to whether such tax shall be denominated a license tax, or merely a special tax, is wholly immaterial.

The authority of appellant to impose upon and exact of appellees the tax in question must be shown to have been expressly, or by necessary implication, conferred upon it by the legislature, and such power must be strictly construed. This requires an examination of the statutes in respect to the authority conferred by the legislative department upon appellant's common council.

At the time of the adoption of this ordinance the city of Terre Haute was, and had been for many years, an incorporated city under and governed by the general laws of this state relating to the organization of cities, and conferring upon common councils thereof certain enumerated powers. Section 3541 of Burns' Revised Statutes of 1901, which in the main enumerates and confers these powers, provides: "The common council shall have power to enforce ordinances. . . . 12. To regulate the use of coaches, hacks, drays and other vehicles for transportation of passengers, freight or other articles, to or from points within the city, for hire or pay." Section 3617 of Burns' Revised Statutes of 1901, among other things provides that "The common council shall have power to levy and cause to be assessed and collected . . . a specific tax on omnibuses, or other carriages and other vehicles used, and run for passengers for hire, unless the same be <sup>308</sup> licensed." An act of the legislature, approved March 2, 1897 (Acts 1897, p. 113), which is supplemental to the general laws pertaining to cities, provides: "That common councils of incorporated cities shall have the power to enact and enforce ordinances. . . . 2. To license, tax and regulate vehicles." This provision of the statute is not intended to apply to vehicles as property, but is applicable only to taxing or regulating their use upon the public streets of a city.

The charter of the city of Indianapolis confers upon the common council the power "to license, tax and regulate wheeled vehicles," and provides that the funds derived therefrom shall be applied only to the maintenance and repair of the streets and alleys of the city. The council passed an ordinance whereby

a license tax was imposed for the use of certain specified vehicles on the streets of the city.

In the appeal of *Tomlinson v. City of Indianapolis*, 144 Ind. 142, 43 N. E. 9, the appellant was a nonresident of the city of Indianapolis, engaged in marketing garden produce without having procured a license for his market-wagon as required by the ordinance. He was convicted for a violation thereof in using his unlicensed wagon on the public streets of the city, and on appeal to this court it was held that the city, under its charter, was fully empowered to require a nonresident of the city to pay a license fee for using its streets by running a market-wagon thereon in like manner as residents of the city were required to pay under the ordinance. In that case it was said that the license fee exacted was not a tax on personal property, but was rather in the nature of a toll charged for the use of the improved streets over which vehicles are driven. The writer of the opinion, however, in that case, seems to have fallen into the error of asserting, in effect, that the city in exacting the license tax was doing so in the exercise of the police <sup>309</sup> power, and not of the taxing power expressly conferred upon it by the legislature.

There is no force in the claim of counsel for appellees that the ordinance herein involved violates section 1 of article 10 of the state constitution which provides for a uniform and equal rate of assessment and taxation; for it has been decided by this court, and is affirmed by other authorities in respect to similar constitutional provisions, that this section of our fundamental law relates to a general assessment of taxes on property according to its value: *Thomasson v. State*, 15 Ind. 449, and cases there cited; *State v. Mayor etc.*, 58 N. J. L. 604, 33 Atl. 850; *Burroughs on Taxation*, section 77.

By section 3623 of Burns' Revised Statutes of 1901, and section 3161 of Horner's Revised Statutes of 1901, the common council of the city of Terre Haute, at the time the ordinance in controversy was adopted, was given the exclusive power over its public streets. The city, under this authority, held such streets in trust for public purposes: *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 31 N. E. 57, and cases cited. In addition to the powers conferred by the above section and other provisions of law by which the city was controlled, it, as we have shown, was expressly empowered by the legislature in 1897 not only to license and regulate vehicles, but also to tax them. It must be conceded that cities and towns of this state cannot exercise the



power of taxation under the guise of a license or otherwise, unless such power is unequivocally conferred upon them by the legislature. When such power is, however, clearly conferred upon such municipalities, courts have generally upheld the proper exercise thereof.

The running of hacks, carriages, and other vehicles over the streets of a city, whether used thereon for public or private purposes, will necessarily, in the course of time, impair and wear them out; and, by reason of this well-recognized fact, cities are subjected to large expenditures of money to repair the wear and tear upon their streets, <sup>310</sup> due in the main, to the use or running of vehicles thereon. Under such circumstances there is nothing unjust or wrong in a city, when so empowered by the legislature, requiring the payment of a properly or reasonably graduated tax, as in the case at bar, which must be considered in the nature of a toll imposed for the exercise of the privilege of using the streets by means of vehicles. In fact, the right of exacting the payment of such a license tax is akin to the principle by which the establishment of toll-roads over public highways by virtue of legislative authority, and the right to collect toll from persons traveling in vehicles thereon, is sustained. The legislature of this state has the right, and in the past has exercised the same, to authorize a turnpike company to lay out its road over a public highway, and to exact toll from those who drive vehicles thereon. While every person, under like circumstances, has the right to use such turnpike as a highway, nevertheless for the privilege of doing so he must pay the reasonable tribute or toll laid on all travelers alike: Elliott on Roads and Streets, 2d ed., sec. 71; Cooley on Taxation, 2d ed., 130; Angell on Highways, 3d ed., sec. 8.

In sec. 454 of Judge Elliott's work on Roads and Streets, second edition, that eminent author says: "A license or tax on all vehicles used for hire on the public streets may be enforced, although the owner of a vehicle so used lives outside the city limits." That municipal corporations may be empowered by the legislature to impose a tax upon owners of vehicles for using the same upon the public streets is, as a general proposition, fully affirmed by the authorities: Burroughs on Taxation, sec. 77; Chess v. Birmingham, 1 Grant Cas. 438; Bennett v. Birmingham, 31 Pa. St. 16; Gartside v. East St. Louis, 43 Ill. 47; City of St. Louis v. Green, 7 Mo. App. 468, 70 Mo. 562; State v. Mayor etc., 58 N. J. L. 604, 33 Atl. 850; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; Smith v. City of Louisville, 9 Ky.

Law Rep. 779, 6 S. W. 911; *Tomlinson v. City of Indianapolis*, 144 Ind. 142, 43 N. E. 9. See cases collected in footnote to the case last cited in 36 L. R. A. 413.

In *Burroughs on Taxation*, section 77, the author says: "When the amount of the fee is only such as would probably cover the expense of enforcing the regulations of the state as to the particular calling, it is under the police power, but when the fee is larger than is necessary for such purpose, and is exacted with reference to revenue, the license is issued under the taxing power of the state. This is a most convenient mode of taxation, and is recognized in the constitutions of most of the states, where it is contrasted with the property tax, in those provisions which limit the power of the state to tax property otherwise than by a uniform system and according to value. But whether mentioned in the constitution or not, the provisions as to equality and uniformity do not apply to taxes on licenses."

The fact that a vehicle is not used by its owner for hire, but is only used on the streets in his own business or for his own pleasure, is of no special importance, when the power is conferred to license and tax vehicles generally.

The legislature of Maryland imposed a license tax on persons keeping or exhibiting for use a billiard-table. A club, organized for literary and social purposes, kept a private billiard-table for the use and amusement of its own members. This club, under the statute, in *Germania v. State*, 7 Md. 5, has held liable for the tax, the court holding therein that the state was empowered to tax the amusements of the people, either for revenue, or as a police regulation.

That the power of the legislature in matters of taxation for public purposes is unlimited, except so far as restrained by the state or federal constitution, is well settled: *Lowe v. Board*, etc., 156 Ind. 163, 59 N. E. 466, and cases there cited. That the state possesses plenary powers over public highways and streets is a proposition also well settled. While it is <sup>312</sup> true that a public street of a city or town is a public highway, open alike to travel thereon of every citizen, still this in no wise prevents the state, through the agency of its municipalities, from subjecting the right to the use of the street to reasonable conditions or restrictions. As cities in this state, under the law, are required to keep their streets in repair, the legislature, in the exercise of its discretion, appears to have deemed it proper to authorize common councils thereof, if they so desired, to exact that those who used them with wagons, carriages, and other vehicles should con-

tribute to such repairs by the payment of a reasonable amount on account of such use.

The ordinance in question seems so to grade the tax imposed that the owners of vehicles whose use of the streets, in the course of time, would subject them to the most wear are required to pay the greater tax. The tax being imposed, as disclosed by section 5 of the ordinance, for the purpose of raising revenue to be applied to the maintenance and repair of the streets, it would be inconsistent and unreasonable to graduate the amount to be paid according to the value of the vehicles. Their value, under the circumstances, cannot be considered as a factor in regard to the wear or injury to the streets resulting from their use thereon, for it is manifest that a wagon or carriage worth not to exceed fifty dollars might, in its use upon the streets, serve to wear them as much or more than one of the value of five hundred dollars.

In our opinion, the ordinance is not open to any of the objections, constitutional or otherwise, urged by counsel for appellees; and as the power to adopt it, as we hold, was expressly conferred by the legislature, we are, for the reasons herein stated, constrained to sustain it as a valid exercise of the power conferred upon appellant's common council. It follows, therefore, and we so conclude, that the lower court erred in holding the ordinance void, and in enjoining appellant from enforcing it against the appellees. The judgment is therefore reversed, and the cause remanded <sup>313</sup> to the lower court for further proceedings not inconsistent with this opinion.

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*Tax on Vehicles.*—A statute requiring persons keeping and using vehicles in a city to pay a tax for that privilege, the revenue to be applied to improving and repairing streets, does not authorize double taxation, though such property is also assessed in proportion to its value and a tax levied thereon: *Fort Smith v. Scruggs*, 70 Ark. 549, 91 Am. St. Rep. 100, 69 S. W. 679. But in *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907, it is held that a city has no power to impose a license tax on all persons using vehicles on its streets for their individual use exclusively in their own business or for their own pleasure; and that an ordinance providing that money received from license fees imposed thereby on all vehicles shall be expended in improving the streets, creates a double taxation and is void, when such vehicles are taxed at their value, for general purposes.

## DIXON v. POE.

[159 Ind. 492, 65 N. E. 518.]

**CONSTITUTIONAL LAW—Class Legislation.**—A statute prohibiting the issuing by merchants of tokens otherwise than in lawful money, in payment for the assignment or transfer of wages earned or unearned by any employé or laborer in any coal mine, and making tokens issued in violation of such statute, in the hands of any owner, immediately due and payable in lawful money to the extent of the wages assigned, is unconstitutional as conferring on a class of citizens special privileges and immunities, and as being class legislation against another class of citizens. (p. 310.)

J. T. Hays and W. A. Hays, for the appellant.

J. B. Filbert, for the appellee.

**493 DOWLING, J.** This action was brought by the appellee against the appellant, under the act of March 11, 1901 (Acts 1901, p. 548; Burns' Rev. Stats. 1901, sec. 7448a), to recover from the appellant the amount of wages assigned by one Walsh, an employé in a coal mine in this state, to the appellant, in consideration of the issue to him of four metallic tokens calling for and payable in goods at the store of the appellant in this state. The complaint stated facts sufficient to bring the case within the statute, and a demurrer to it was overruled. An answer was filed by appellant alleging that the wages assigned were already earned at the time of such assignment; that appellant had for years owned and carried on a general retail store in this state; that the four metallic tokens expressed the agreement of the appellant to pay in merchandise at his store, at the usual cash price, the amount stamped on each of them; that Walsh, the miner, knew this, and agreed to accept merchandise in payment of the sum represented by said tokens; that the appellee had notice of these facts when he became the owner of the said tokens; that appellant has at all times been ready and willing to pay said tokens in merchandise, according to his agreement, but that neither Walsh nor the appellant has at any time demanded payment of said tokens in merchandise. A demurrer to the answer having been sustained, the appellant refused to plead further, and, upon proof of his complaint, judgment was rendered in favor of the appellee.

The errors assigned are: 1. That the court erred in overruling the demurrer to the complaint; and 2. In sustaining the demurrer to the answer. The question presented <sup>494</sup> is the



validity of the act of March 11, 1901, prohibiting the issuing of tokens payable otherwise than in lawful money of the United States, upon an assignment of wages earned or unearned by any employé or laborer in any coal mine in this state, and making any such tokens issued in violation of the act, in the hands of any owner, immediately due and payable in lawful money to the extent of the wages assigned.

The objections taken to the act by the appellant are that it contravenes section 1, article 1, of the state constitution, which declares that life, liberty, and the pursuit of happiness, are inalienable rights; and that it violates section 23, article 1, of the constitution which prohibits the general assembly from granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not belong equally to all citizens.

We do not deem it necessary to determine the question whether the act before us unduly restricts the right of the citizens of this state to contract, or whether its practical effect may not be to take private property without due process of law. We shall consider the act solely with reference to that clause of the constitution which interdicts class legislation, or the grant to any citizen, or class of citizens, of special privileges or special immunities.

The body of the act mentions and includes "any merchant or dealer in goods or merchandise, or any other person," upon the one hand, and "any employé or laborer for wages, who labors in and about any coal mine in this state," upon the other. So far, then, as the classification first mentioned is concerned, it is comprehensive enough to include all of the citizens of the state, treating all alike, conferring no special privileges or immunities upon any, and subjecting none to restrictions in trade or business, to deprivation of property rights, or to penalties which are not equally and impartially imposed upon all other citizens similarly situated. But an examination of the title of the act discloses <sup>495</sup> that its subject, as expressed therein, is not coextensive with the act itself. It is in these words: "An act concerning the issuance of checks, tickets, tokens, or other devices payable in merchandise, or anything other than lawful money by merchants, in payment for the assignment or transfer of wages of employés in coal mines, and repealing all laws in conflict therewith." So that, as the title refers only to merchants who issue "checks, tickets, tokens, or other devices," no

persons, natural or artificial, can be brought within the scope of the act who do not belong to the particular class designated in the title as merchants: Const., art. 4, sec. 19; *Mewherter v. Price*, 11 Ind. 199; *State v. Bowers*, 14 Ind. 195; *State v. Young*, 47 Ind. 150.

The statute, therefore, must be treated as an enactment operative only upon two classes of persons—merchants, and employés in coal mines. All other persons, copartnerships, and corporations in the state may issue checks, tickets, tokens, or other devices payable in merchandise, or anything other than lawful money, in payment for the transfer of the wages of employés in coal mines, but no merchant in this state is permitted to do so. The mechanic, the farmer, the professional man, the banker, or broker may lawfully take an assignment of the wages of the coal miner, and, in consideration of such transfer, may issue to the miner a check, ticket, or token payable only in merchandise, work, produce, professional services, or depreciated notes, or currency. The merchant must redeem his check, ticket, or token in gold, silver, United States treasury notes, or other lawful money of the United States. By confining the prohibitory terms of the statute to merchants, and exempting all other persons, natural and artificial, from their operation; by declaring void the agreement of the merchant, but leaving the same kind of contract valid as to the farmer, mechanic, or banker; by permitting one class of citizens to pay their debts in merchandise, but requiring another, under precisely the same circumstances, to pay in lawful <sup>496</sup> money only, the act, undeniably, confers valuable privileges on the mechanic, farmer, professional man, banker, and broker, and denies them to the merchant. Total immunity from the restrictions, inconveniences, and losses resulting, and intended to result, from the statute is granted to one class and is impliedly withheld from another. Is a distribution of the citizens of the state in an act concerning the transfer of a claim for wages, which puts the merchants of the state in one class and all other citizens in another, a reasonable and constitutional arrangement? Could an act of the legislature, which authorized a judgment without stay of execution or exemption upon an account or claim due to any merchant, be upheld against the objection that this was a privilege granted to merchants as a class, and which could not, upon the same terms, be enjoyed by the other citizens of the state? Or would an act stand which fixed the amount of

property to be set off to every merchant as exempt from execution at one thousand dollars, while it limited exemptions to the other citizens to six hundred dollars? Such a classification would be regarded by everyone as unnatural, and in violation of the provision of the constitution prohibiting such distinctions.

Again, is the classification of the supposed beneficiaries of the act a reasonable and legal one? They are described as "any employé or laborer for wages who labor in and about any coal mine in this state." This classification seems to rest upon no sound or proper basis. Laborers and employés engaged in a particular industry, who are no less intelligent and no less competent to care for their own interests than laborers and employés pursuing other occupations, are, by the statute, singled out and authorized to avoid their express agreements, when, under like circumstances, such other laborers and employés enjoy no such privilege. The law does not embrace all of the class to which it is naturally related. It creates a preference, and establishes an inequality among a class of citizens all of 497 whom are equally meritorious. It applies to persons in certain situations, and excludes from its effect other persons who are not dissimilar in these respects. Leaving the miner and the merchant free to deal with all other citizens, the act disqualifies them from contracting with each other: *State v. Parsons*, 40 N. J. L. 1; *Indianapolis St. Ry. Co. v. Robinson*, 157 Ind. 232, 61 N. E. 197; *Brewer v. McClelland*, 144 Ind. 423, 32 N. E. 299; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959; *State v. Fire Creek etc. Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891, 10 S. E. 288; *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *Wally's Heirs v. Kennedy*, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511; *Bank etc. v. Cooper*, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517.

It is said by Judge Cooley in *Constitutional Limitations*, fifth edition, 393: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and

if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to <sup>498</sup> the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negated."

The statute under review does undertake to provide that persons following the lawful trade of merchants shall not have capacity to make certain contracts, or to receive certain transfers of personal property which are entirely permissible to others. It also, and in a manner quite as offensive to the constitution, confers privileges and immunities upon employes and laborers in coal mines which are not possessed by other citizens of this state employed as laborers in other occupations.

We do not wish to be understood as saying that statutes free from any constitutional infirmity may not be enacted, which apply exclusively to merchants, coal miners, bankers, physicians, dairymen, druggists, or persons engaged in other particular occupations. Such a classification may, in some cases, be a legitimate one. But in every instance of this kind where such statutes have been upheld, the classification has rested upon some quality, condition, or state of things peculiar to the occupation itself, or upon some consideration of public policy which made it proper or necessary to regulate, control, license, tax, or prohibit it: *State v. Green*, 112 Ind. 462, 14 N. E. 352; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Blair v. Kilpatrick*, 40 Ind. 312; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469; *Ferner v. State*, 151 Ind. 247, 51 N. E. 360; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *State v. Webster*, 150 Ind. 607, 50 N. E. 750; *Parks v. State*, 159 Ind. 211, 64 N. E. 862.

We have found no case sustaining a statute which prohibited an individual engaged in a particular, lawful occupation, <sup>499</sup> and



not under special disability, such as infancy, insanity, or the like, from doing an act, not necessarily connected with his business, which every other citizen was by law permitted to do.

The only case referred to by counsel for appellee in support of their contention that the act of 1901 (Acts 1901, p. 548, Burns' Rev. Stats. 1901, sec. 7448a) is valid, is *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253. The question there was whether the legislature could prohibit men from contracting in advance to accept payment in something other than the lawful money of the country for the wages they might earn in the future. It was held that the acts prohibiting such contracts were within the scope of legislative power. The acts referred to in that case applied to "any owner, corporation, association, company, firm or person engaged in mining coal, ore or other minerals, or quarrying stone, or in manufacturing iron, steel, lumber, staves, heading, barrels, brick, tile, machinery, agricultural or mechanical implements or any article of merchandise"; and, as its beneficiaries, it embraced "any persons" executing a contract or agreement to waive his or her legal right to demand or receive from such owner, corporation, etc., at least once every two weeks, payment of the amount due to such persons for labor performed, in lawful money of the United States: Acts 1887, p. 13; Acts 1889, p. 191; Elliott's Supplement, secs. 1599, 1610. No question as to an improper classification seems to have been made, and the act applied to all persons and corporations in this state engaged in mining, quarrying, or manufacturing, and to every one in their employment. The point decided in that case was the power of the legislature to restrict the right to contract for a waiver of the benefit of the statute. The question before us under the act of 1901 is the constitutionality of the classification adopted. *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253, has no application to this question, and throws no light upon it.

500 It is with great reluctance that we declare an act of the legislature invalid; but the act of 1901, *supra*, so plainly violates the rule of the constitution forbidding the grant of special privileges and immunities to a favored class of citizens and subjecting another class to special disabilities and restrictions, that we have no choice but to adjudge it void.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

*Class Legislation* is constitutional if the statutes are general in their application to the class at which they are aimed, and the distinction is not arbitrary, but based on public policy. But such legislation must extend to and embrace equally all persons who are or who may be in the like situation or circumstances, and the classification must be natural and reasonable, not arbitrary or capricious: See the monographic note to *State v. Ellet*, 21 Am. St. Rep. 785; *State v. Justus*, 85 Minn. 279, 88 N. W. 759, 89 Am. St. Rep. 550, and cases cited in the cross-reference note thereto; *Porter v. Charleston etc. Ry. Co.*, 63 S. C. 169, 90 Am. St. Rep. 670, 41 S. E. 108; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553; *Davis Coal Co. v. Pollard*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; *State v. Superior Court*, 28 Wash. 317, 92 Am. St. Rep. 831, 68 Pac. 957.

*Statutes Prohibiting Mining Companies* from issuing any evidence of indebtedness to their employés payable in anything but money, are considered in the monographic note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 177, 178. See, also, *Slocum v. Bear Valley Irr. Co.*, 122 Cal. 555, 68 Am. St. Rep. 68, 55 Pac. 403.

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## DUDGEON v. BRONSON.

[159 Ind. 562, 64 N. E. 910, 65 N. E. 752.]

**EASEMENTS—Private Ways—Right to Widen.**—If a person has selected, accepted and used for a long number of years a private way of a certain width over a particular part of the lands of the person holding the servient estate, the former has no right to change it by widening it, on the ground that it has become wet and inconvenient, but he must be confined to the way thus selected. (p. 316.)

**EASEMENTS—Private Ways—Right to Change.**—If a private way has been once selected, it cannot be changed in any manner by either party without the consent of the other. (p. 316.)

W. Leonard and E. Leonard, for the appellant.

E. V. Harris, for the appellees.

<sup>563</sup> DOWLING, C. J. Mary C. Bronson, the plaintiff below, with whom was joined her husband, sued the appellant for a way of necessity over lands owned by him. The court overruled a demurrer to the amended complaint. A special finding of facts was made, and conclusions of law were stated thereon. The appellant excepted to each conclusion. Motions for a new trial and for a venire de novo were also made and overruled. These decisions of the court are assigned for error.

The complaint shows that in 1875, one Stone owned two tracts of land in Allen county, one of which contained one hun-

dred and sixty acres, and the other forty acres. Stone sold the larger tract in 1875 to one Benninghoff, and in the same year conveyed the smaller to the appellee Mary C. Bronson. The one hundred and sixty acre tract bordered upon a highway, but the forty acre tract had no outlet. The appellant is a remote grantee of Benninghoff. The successive owners of the larger tract have recognized the right of the appellee to a way over the same to the public highway, and such way is in use by the appellee, but, on account of the character of the location of the said way, which is low and wet for a large part of the year, and the nature of the soil, which is soft, the appellee cannot pass over the said way without inconvenience and difficulty. In its present condition, the said way is useless to the appellee for ingress and egress to and from her land, and an additional strip four feet in width, running the whole length of said way, is required to render said way passable and useful. The appellant refused to let the appellee <sup>564</sup> use such additional strip, and has forbidden her to enter upon the same. The relief prayed for is that the width of the way be fixed at twenty feet.

The case stated in the complaint is one in which the appellee was originally entitled to a way of necessity. Stone owned both the outer and larger tract bordering on the highway, and the inner and smaller one which had no outlet. If the smaller tract was first sold, the right of access to the highway over the lands of the grantor was appurtenant to the grant. If the larger tract was first sold, then a way of necessity was impliedly reserved by the grantor for the benefit of the forty acre tract. But it appears from the complaint that, after the conveyance of the two tracts by Stone, a way, sixteen feet in width, was granted to and accepted and used by the appellee, and that she still continues to use it. She does not allege that she has no outlet from her land to the public highway, but says that the way—which we must presume was agreed upon between the appellee and the appellant, or his grantors—has become wet and inconvenient, and therefore useless. Having accepted a way of a certain width, and over a particular part of the lands owned by the party holding the servient estate, the appellee has no right to change it, but must be confined to the way thus selected. The grounds of the complaint are mere matters of inconvenience. That the way once selected and agreed upon is too steep, or too narrow, or too wet, does not entitle the ap-

pellee to demand a new way, or to increase the width, or change the direction of the old one. The right of way from necessity over the land of another is always of strict necessity, and nothing short of this will create the right.

It is said in *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031, that: "When the way is once selected it cannot be changed by either party without the consent of the other": Citing *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Holmes v. Seely*, 19 Wend. 507, 510; *Morris v. Edgington*, 565 3 Taunt. 24; *Goddard's Law of Easements*, Bennett's ed., 351. See, also, 2 *Washburn on Real Property*, 4th ed., 306; *Washburn on Easements and Servitudes*, 4th ed., 258, 263.

"The grantee is bound to keep the way in repair, and is not permitted to go extra viam as a traveler upon a public highway is allowed to do when the way is impossible, except, it seems, when the private way is temporarily or accidentally obstructed": *Holmes v. Seely*, 19 Wend. 507, 510.

"Where the right to an easement is granted without giving definite location and description to it, the exercise of the easement in a particular course or manner, with the consent of both parties, renders it fixed and certain, and the dominant owner has no right afterward to make changes affecting its location, extent, or character": 10 Am. & Eng. Ency. of Law, 2d ed., 430, and cases cited in note 3.

The situation of the appellee is the same as if her deed from the owner of the servient tract had expressly granted and described a way sixteen feet wide from her forty acre lot over the one hundred and sixty acre tract to the highway, along the route followed by the way she now owns. In that case she certainly could not have compelled the appellant to give her a new way, or to increase the width of the old one.

As it appears from the complaint that the appellee can get to her property from the highway over a way already belonging to her, and as that way must have been selected or agreed upon by her, no ground is shown for her claim to an additional strip as a way of necessity. The demurrer to the complaint should have been sustained. The other errors assigned need not be considered.

For the error of the court in overruling the demurrer to the complaint, the judgment is reversed, with directions to sustain the demurrer, and for further proceedings in accordance with this opinion.



**RIGHTS AND OBLIGATIONS OF PARTIES TO PRIVATE WAYS.\*****I. Rights and Obligations of the Owner of the Fee.**

- a. Right to Use Way.
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**I. Rights and Obligations of the Owner of the Fee.**

a. **Right to Use Way.**—A right of private way, no matter how acquired, carries with it by implication only such incidents as are necessary to its reasonable enjoyment. Hence, the grant of a right of way, which is not exclusive in its terms, and which can be reasonably enjoyed without being exclusive, leaves in the grantor and his assigns the right of user in common with the grantee: *Bane v. Bean*, 63 Mich. 652, 30 N. W. 373; *Campbell v. Kuhlmann*, 39 Mo. App. 628; *Wilson v. Wilson*, 2 Vt. 68. The owner of the land has the right to use the way for any purpose whatever, provided he does not interfere with the right of passage resting in the owner of the easement: *Chandler v. Goodridge*, 23 Me. 78. If a person has only a right of way over the land, such right "does not carry with it a right to the exclusive possession of the land. The owner may still use it for any purpose which does not materially impair, nor unreasonably interfere with, its use as a way. He may use it as a way himself or permit others to so use it," and may remove obstructions placed in the way by the holder of the easement to prevent such use without being liable therefor: *Morgan v. Boyes*, 65 Me. 125. The owner of land over which another has a right of way may use it in any manner he sees fit, provided he does not unreasonably interfere with the latter's reasonable use in passing to and fro: *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974.

b. **Right to Obstruct Way.**—The owner of a fee in a private way cannot close it, or totally obstruct it against those as to whom it is subjected to the servitude: *Goss v. Calhane*, 113 Mass. 423; *Collins v. Buffalo Furnace Co.*, 73 App. Div. 22, 76 N. Y. Supp. 420. Thus if a passway is well established, has been used for a long time and is well marked, the owner of the land subject to such easment cannot rebuild his fence so as to make such passway straight, if

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\*REFERENCES TO MONOGRAPHIC NOTES.

Use of private ways: 88 Am. Dec. 279-282.

Ways—Rights and remedies of parties entitled thereto: 100 Am. Dec. 115-119.

such action will change its course, and totally obstruct the old way: *Calvert v. Weddle*, 19 Ky. Law Rep. 1883, 44 S. W. 648. While this is, undoubtedly, true, yet a person having a private right of way not specifically defined as to its extent or use, is entitled as against one holding under the grantor, or a common source of title, to such a right of way as is reasonably necessary and convenient for the purposes for which it was originally created, and no more. He has no right to impose additional burdens upon it, and the owner of the fee may build over it, provided he does not thereby interfere with a reasonable use of it by the owner of the easement: *Sutton v. Groll*, 32 N. J. Eq. 213, 5 Atl. 901; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974; *Weed v. McKeg*, 37 Misc. Rep. 105, 74 N. Y. Supp. 250. But an action may be maintained for any building over, or obstruction of the right of way, which renders it inconvenient, less useful and makes its use impracticable to an appreciable extent: *Richardson v. Pond*, 15 Gray, 387. A grant for a right of way over a lot to and from a wood lot, at all times when such lot is not sown with grain, and at all times when there is sleighing subjects the granted land to merely a qualified and limited, and not a general, right of way at all times, the grantor retaining the right to cultivate the soil within the limits of the way as theretofore used, and does not give to the grantee the right to enter when the way is sown with grain, and repair it with any desired material: *Wells v. Tolman*, 156 N. Y. 636, 51 N. E. 271. If a grantor retains a right of way over land, the grantee has a right to plow and sow the land, if such use does not materially interfere with the grantor's right of way: *Moffitt v. Lytle*, 165 Pa. St. 173, 30 Atl. 922; and to the same effect, *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. The owner of land over which another has a right of way may use it, or partially obstruct it, in any way that he sees fit, provided he does not thereby unreasonably interfere with the latter's reasonable use in passing along the right of way: *Russell v. Jackson*, 2 Pick. 574; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974.

The general rules of law which govern the rights and obligations of parties to a private way apply as well to subterranean rights of way as to those upon the surface, and the owner of coal lands through which another has a right of way by subterranean entry to reach coal mines in an adjoining tract, may lawfully construct an entry crossing such right of way, provided this can be done without destroying or substantially interfering with the use thereof: *Pomeroey v. Salt Co.*, 37 Ohio St. 520. As the owner of the land subject to the right of way has a right to use the way in any manner which does not obstruct the free passage of the owner of the way, he also has the right to remove any obstruction placed in such right of way by the owner thereof, without authority of law: *Quintard v. Bishop*,

29 Conn. 366; *Morgan v. Boyes*, 65 Me. 124; *Dickinson v. Whiting*, 141 Mass. 414, 6 N. E. 92.

**c. Right to Maintain Fence or Gate Across Way.**—No duty is imposed upon the owner of land over which another has a right of way to do any positive act; all that is required of him is to abstain from unlawfully interfering with the easement. He is neither required to erect fences, so as to prevent domestic animals belonging to the dominant tenement, and passing along the way, from trespassing on his land, nor to prepare the surface of the way for safe travel. These duties devolve upon the owner of the right of way: *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538. In the absence of a provision in the grant of a private right of way, that it shall remain open and free from encumbrance, it is a general rule that the owner of the land subject to right of way may maintain a gate or temporary fence across it, if it is necessary to the use and enjoyment of his land, and does not unreasonably interfere with the use of the way by the person entitled thereto, and the latter has no right to totally remove such gate or fence: *McTavish v. Carroll*, 17 Md. 1; *Hartman v. Fick*, 167 Pa. St. 18, 46 Am. St. Rep. 658, 31 Atl. 342; *Dyer v. Walker*, 99 Wis. 404, 75 N. Y. 79. The owner of the land subject to such easement has all the rights of an owner therein, subject only to a reasonable use of the easement. Hence, he may build a fence across such way if he offers to and is willing to take it down every time that the holder of the easement desires to pass or repass: *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. But the owner of the land has no right to fence the way in such manner as to totally obstruct it, and cut off and interfere with the right of passage resting in the holder of the easement: *Moffitt v. Lytle*, 165 Pa. St. 173, 30 Atl. 922. Even if the right of way is limited to a particular use, but the instrument creating it provides that it shall be kept open and free from encumbrances, the grantor has no right to put a fence thereon and across it, or in any manner obstruct it, and such obstruction may be lawfully removed by the owner of the dominant estate: *Brownell v. Dyer*, 5 Mason, 227, Fed. Cas. No. 2038; *Mineral Springs Mfg. Co. v. McCarthy*, 67 Conn. 279, 34 Atl. 1043; *Patton v. Western Carolina etc. Co.*, 101 N. C. 408, 8 S. E. 140.

A mere grant of a right of way across the grantor's land for travel and private road privileges never implies that it shall be open and free from gates or bars, and gates or bars may be lawfully maintained across such right of way by the person granting such right when they are necessary to his convenient use of his remaining land, and do not unduly interfere with a reasonable and proper enjoyment of the way. The mere fact that they cause inconvenience and annoyance is no ground for their removal: *Boyd v. Bloom*, 152 Ind. 152, 52 N. E. 751; *Houpes v. Alderson*, 22 Iowa, 160; *Patout v. Lewis*, 51 La. Ann. 210, 25 South. 134; *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506; *Bean v. Coleman*, 44 N. H. 539; *Stevens v. Allen*, 29 N.

J. L. 68; Cannery v. Brooke, 73 Pa. St. 80; State v. Jefecoat, 11 Rich. 529; Whaley v. Jarrett, 69 Wis. 613, 2 Am. St. Rep. 764, 34 N. W. 727; Johnson v. Borson, 77 Wis. 593, 20 Am. St. Rep. 146, 46 N. W. 815. If the right of way arises from prescription, and gates have always been maintained across the way, the owner of the servient estate has a right to have them kept up and maintained: Fowle v. Bigelow, 10 Mass. 379; Garland v. Furber, 47 N. H. 301.

**d. Right to Maintain Gates at Terminus.**—In the absence of an express provision for an open way in a grant or gift of a private right of way, the owner of the fee may shut the termini thereof by gates, which the grantee must open and close when he uses the way. As nothing passes as incident to a grant for a right of way over the land of another, except what is necessary for its reasonable and proper enjoyment, the grant of such way does not deprive the grantor of the right to erect gates at the termini of such way in entering and leaving his land: Frazier v. Myers, 132 Ind. 71, 31 N. E. 536; Boyd v. Bloom, 152 Ind. 152, 52 N. E. 751; Admonson v. Severson, 37 Iowa, 602; Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409; Short v. Devine, 146 Mass. 119, 15 N. E. 148; Whaley v. Jarrett, 69 Wis. 613, 2 Am. St. Rep. 764, 34 N. W. 727. The owner of the fee may maintain a gate at the place where a private way intersects the public road, as a reasonable and legitimate exercise of a right which resides in the owner of the servient estate: Truax v. Gregory, 196 Ill. 83, 63 N. E. 674; Phillips v. Dressler, 122 Ind. 414, 17 Am. St. Rep. 375, 24 N. E. 226; Johnson v. Borson, 77 Wis. 593, 20 Am. St. Rep. 146, 46 N. W. 815. In Ames v. Shaw, 82 Me. 379, 19 Atl. 856, it was held that a private way, whether created by grant or adverse use, might properly be subjected to gates or bars at its termini not unreasonably established, and that the nature of the easement gained determines its character, and not the particular manner of the use that created the right. While this may be the better rule, it seems to be opposed to the weight of authority which maintains that a right of way by prescription is commensurate with and measured by the use, and that the owner of the land has no right to do anything which will hinder or obstruct such use. Hence if such way has been used without gates for more than twenty years, the owner of the servient estate has no right to erect gates on the way as the owner of the easement is entitled to the use of the way unobstructed by gates: Faulkboner v. Corder, 127 Ind. 164, 26 N. E. 766; Welch v. Wilcox, 101 Mass. 162, 100 Am. Dec. 113; Shivers v. Shivers, 32 N. J. Eq. 578. If the owner of the right of way by purchase has fenced it, he is entitled to have it kept open, and the owner of adjoining lands has no right to maintain a fence and gate across the way where it enters the highway. If, in the grant of the right of way, no provision is made for the maintenance of gates thereon, the grantor is not required, nor can he be compelled, to



maintain a gate where the way terminates and enters the public road: *Rowe v. Nally*, 81 Md. 367, 32 Atl. 198.

**e. Obligation of Land Owner.**—Although, as we have shown, the owner of the land is entitled to make any reasonable use of a right of way granted by him which is not inconsistent with its use for passage by the grantee, and although he may generally maintain gates thereon, yet the owner of land burdened with a right of private way is bound to furnish reasonable facilities, determined by the circumstances of the case, for its enjoyment of the one entitled to the right: *Bakeman v. Talbot*, 31 N. Y. 366, 88 Am. Dec. 275. Where one party has a right of way through the land of another to a public road, the latter must leave it open, and is not justified in closing it by the fact that there is another way to such road: *Manbeck v. Jones*, 190 Pa. St. 171, 42 Atl. 536. If a way is moved by the acquiescence of all the interested parties for the benefit of the land owner, upon whose property the right of way exists, he cannot close the new way, nor prevent its use by one who has an appurtenant right to the use of the old way, without restoring the old one: *Durkee v. Jones*, 27 Colo. 159, 60 Pac. 618. If a grantor of certain lands has another way to his remaining lands, or another mode of access thereto, however inconvenient, he cannot claim a way of necessity by implication in the lands granted, although he may have been in the use of a way over it to the public road at and for a long time before the conveyance, and of which the grantee had notice at the time: *Meredith v. Frank*, 56 Ohio, St. 479, 47 N. E. 656.

If a right of way is reserved, but specifically defined, the way need be only of such width as is reasonably necessary and convenient for the purpose for which it was created and granted. In such case, it seems that the land owner is not obliged to relinquish any more land than is necessary for the convenient use of the owner of the dominant estate, and the latter has no right to insist that it shall not be altered, and its width decreased, unless the whole is necessary for his purposes: *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974. On the other hand, it appears that under grant of a way "as now laid out" the owner of the land over which the way passes cannot lessen its width by planting posts thereon: *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113.

## II. Rights and Obligations of Owner of Way.

**a. Location.**—If one has a right to an easement in the lands of another, for a private way, and such way is to be located for the first time, no prior use thereof having been made, the owner of the land over which it is to pass has the right to choose it, provided he does so in a reasonable manner, but if the owner of the land fails to select such way when requested, the person who has the right thereto may select a suitable route for it, having due regard to the convenience of the owner of the servient estate; and, when

once selected, it cannot be changed by either party without the consent of the other: *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031; *Holmes v. Seely*, 19 Wend 507-510; *Capers v. Wilson*, 3 McCord, 170. If a right of way is decreed over the lands of another, it is not necessary for the parties to expressly designate its location, but is sufficient if a right of way is used and acquiesced in: *Dickinson v. Crowell* (Iowa), 94 N. W. 495. The owner of the fee in locating a private right of way gained from him must locate it in such place and of such width as to be reasonably suitable, convenient, and sufficient for the necessary purposes for which the right of passage is granted: *Walker v. Worcester*, 6 Gray, 548; *Smith v. Wiggins*, 52 N. H. 112; *Roberts v. Wilcock*, 8 Watts & S. 464; *Walker v. Pierce*, 38 Vt. 94.

**1. Change of Location.**—When a private right of way has been once selected and located, its location cannot be changed by either party; neither the owner of the land nor the owner of the easement, without the consent of the other party: *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031; *Manning v. Port Reading R. R. Co.*, 54 N. J. Eq. 46, 33 Atl. 802; *Galloway v. Wilder*, 26 Mich. 96. If a right of way is granted without any designation of the place, it becomes located by usage for a length of time, and, after being so located, it cannot afterward be changed by the grantor without the consent of the grantee: *Wynkoop v. Binger*, 12 Johns. 222. The location of a private way determined by agreement, usage, or acquiescence cannot be changed by one party without the consent of the other: *Kurmüller v. Krotz*, 18 Iowa, 353. The location of a way by necessity, whether created by grant or by prescription, cannot be changed by the owner of the servient estate, after an uninterrupted enjoyment of thirty-five years without the consent of the owner of the dominant estate: *Hines v. Hamburger*, 14 App. Div. (N. Y.) 577, 43 N. Y. Supp. 977. The grantee of a right of way has no right to change its location as often as he may think necessary or at will: *Moorhead v. Snyder*, 31 Pa. St. 514. The location of a way by prescription, which runs in a defined course to a certain point, is no more subject to change by a parol agreement, or by acts and conduct than if it had been created and so described by deed: *Nichols v. Peck*, 70 Conn. 439, 66 Am. St. Rep. 122, 39 Atl. 803. The location of a right of way may be changed if the right to make such change is reserved in the deed creating it, and the new location is convenient to the one having the right to use it: *Lyon v. Lea*, 84 Me. 254, 24 Atl. 844. As the grantee of an established way has no right to change its location without the consent of the grantor, so he has no right to lengthen it without such consent: *Kirkham v. Sharp*, 1 Whart. 323, 29 Am. Dec. 57. If a way has been well defined by use, and as thus used is narrower than the original grant and survey, but as used is wide enough for convenient passing, the location of the way as thus defined cannot be changed by the grantee by widening it to the ex-

tent of the original grant and survey: *Stockwell v. Fitzgerald*, 70 Vt. 468, 41 Atl. 504. Although neither the grantor nor the grantee has any right by himself to change the location of a private way once established, yet the location of such way may be changed with the consent of both parties, and if, after such change, the grantee has used the new road for a length of time, his acquiescence in the change will estop him from again claiming the old right of way, and such will constitute a dedication of the new way: *Larned v. Larned*, 11 Met. 421; *Gage v. Pitts*, 8 Allen, 527; *Wynkoop v. Burger*, 12 Johns. 222; *Lawton v. Tison*, 12 Rich. 88. In such case the owner of the easement has no greater rights in the new way than he had in the old one: *Atwater v. Bodfish*, 11 Gray, 150. If the owner of land across which another has a right of way by prescription or grant, closes the way for his own convenience, and opens a new way across another part of his land, for the use of the person entitled to the right, and the latter acquiesces in the change and uses the new way for some time, the owner of the land cannot close the new way without restoring the old one to its former condition; and, if he does, the owner of the easement may remove the obstructions from the new way: *Hamilton v. White*, 5 N. Y. 9. The owner of the land has no right, without the consent of the grantee, of a right of way to close the old way, although he lays out another convenient way for the use of the grantee of the right to the same highway: *Frazier v. Berry*, 4 R. I. 440. One entitled to pass over certain lands to reach a parcel of his own land, is not obliged to surrender such right on becoming the owner of other realty over which he might pass to the first-mentioned land: *Zell v. Universalist Society*, 119 Pa. St. 390, 4 Am. St. Rep. 654, 13 Atl. 447.

**b. Right to Deviate from Way.**—While the owner of a right of way may do whatever is reasonably necessary to make it suitable and convenient for his use, he is not entitled to use another way merely because the entrance to his established way has become useless, owing to a lawful change in the grade of a public highway: *Nichols v. Peck*, 70 Conn. 439, 66 Am. St. Rep. 122, 39 Atl. 803. And the grantee of a private way which has become impassable, cannot, without becoming a trespasser, go upon the adjoining land, and thus pass around the obstruction. It is his duty to keep his way in repair: *Boyce v. Brown*, 7 Barb. 80; *Williams v. Safford*, 7 Barb. 309. But if the owner of land which is subject to a right of way obstructs such way, the person entitled to use it may enter upon, and go over, the adjoining lands of the owner of the fee, doing no unnecessary damage without becoming a trespasser. In other words, if a private way is unlawfully obstructed by the owner of the adjoining land, the general rule is, that a person entitled to use such way may pass over the adjoining land, so far as is necessary to avoid the obstructions, taking care to do no unnecessary damage: *Kent v. Judkins*, 53 Me. 160, 87 Am. Dec. 544; *Leonard v. Leonard*,

2 Allen, 543; Bass v. Edwards, 126 Mass. 445; Jerstadt v. Smith, 51 Wis. 96, 8 N. W. 29; Johnson v. Borson, 77 Wis. 593, 20 Am. St. Rep. 146, 46 N. W. 815. An impassable obstruction of a private way of prescription, placed in it by the land owner, may justify the owner of the way in deviating from it, and going over another part of the land: Haley v. Colcord, 59 N. H. 7, 47 Am. Rep. 176. If the way is closed by the land owner, and is not limited or defined, the one having the easement may pass to and fro in the manner least prejudicial to the owner of the adjoining land: Farnum v. Platt, 8 Pick. 339, 19 Am. Dec. 330. The only jurisdiction in which this rule has been denied is in New York, where it was held that though the way is rendered impassable by obstructions placed therein by the owner of the adjoining land, the owner of the way is not entitled to go upon the adjoining land in order to pass such obstructions, and his only remedy is to remove the obstructions and sue for damages: Williams v. Safford, 7 Barb. 309. If a person has a right of way along a river, and such way is not limited or defined, he is still entitled to pass on the land adjacent to the river, though the original line of the way is washed away by the encroachment of the river: Copers v. Fripp, Rice, 224. If, however, a person has the right to pass and repass upon the river front of a certain described lot, and the whole of such lot and the intervening land is washed away by the encroachment of the river, the easement acquired by the grantee on the river front is appurtenant to the lot, and not to the remaining land, and is extinguished by the destruction of the lot: Weis v. Meyer, 55 Ark. 18, 17 S. W. 339.

**c. Use of Way.**—The grantee of a right of way takes it subject to all restrictions which the grantor has imposed, and can use it for no other purpose than that provided in the grant: French v. Marstin, 24 N. H. 440, 57 Am. Dec. 294. Thus if a right of way is given to cross the land of another for certain specified purposes, not including the right to cross to a barn, and the grantee subsequently builds a barn on his land, he has no right to use the way, as means of access to his barn, or for any other purpose than those specified in the grant: Valley Falls Co. v. Dolan, 9 R. I. 489. And when a right of way is established by prescription or inferred from user, it is limited to the actual user: Shaughnessey v. Leary, 162 Mass. 108, 38 N. E. 197; Brooks v. Curtis, 4 Lans. 283. But a grant of a right of way for all purposes is not restricted to one purpose, because the owner thereof has had occasion, for a long time, to use it for that purpose only: Holt v. Sargent, 15 Gray, 97. And if a right of way to certain land exists by adverse use and enjoyment only, proof that it has been used for a variety of purposes, covering every purpose required by the dominant estate in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate



while in substantially the same condition: *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519. A grant of a right of way without reserve or limit as to its use may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted: *Abbott v. Butler*, 59 N. H. 317. The enjoyment of a right of way of necessity is ordinarily limited only by the necessity for its use in connection with all lawful uses of the land to which it is appurtenant, and, if not restricted by the instrument creating it, its use cannot be restricted to the use made of the land at the time of the grant: *Whittier v. Winkley*, 62 N. H. 338. A grant of a way from a road over a certain lot to the barn standing on the adjoining lot, being a dwelling-house lot, is a grant a right of way to such dwelling-house lot, for such purposes as a way to the barn appurtenant to the dwelling-house might properly be used, and it is not lost by the destruction of the barn standing on such lot at the time of the grant: *Bangs v. Parker*, 71 Me. 458. If an instrument creating a private way describes it as a "bridle road," this does not confine the use of the way to a particular class or animals, or a special mode of use: *Flagg v. Flagg*, 16 Gray, 175. The use of a private way must be confined to the purpose for which it is granted, and can be used for no other purpose either by the grantee or his licensee without liability in damages: *Louisville etc. Ry. Co. v. Malott*, 135 Ind. 113, 34 N. E. 709. But if a right of way is granted to a person who afterward erects tenement houses on his lands, it has been held that the use of the way by his tenants is permissible, as it imposes no additional burden on the lands of the servient estate by the increased number of persons using the passage in the same manner: *Baldwin v. Boston etc. R. R.*, 181 Mass. 166, 63 N. E. 428. It has also been held that the owner of the right not only has the right to use it, as an undisputed way of passage at all times over the grantor's land, but also such rights as are necessary or incident to the enjoyment of such right of passage, and for this purpose he may exclude strangers from its use, and restrict such use of it by the grantor as is inconsistent with his enjoyment of such use of the right of way: *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800, 23 N. E. 442. The grant of a right of way generally includes only the right to pass to and fro, and the grantee cannot put the way to any use inconsistent with the purpose for which it was granted. He cannot pile lumber on the sides of the way without being liable in damages: *Kaler v. Beaman*, 49 Me. 207. And the dragging of timber upon the land adjoining the way for the purpose of turning such timber around is a misuser of the right of way: *Comstock v. Van Deusen*, 5 Pick. 163. The owner of the way has no right to the ice forming thereon: *Julien v. Woodsmall*, 82 Ind. 568. Nor has he any unlawful right to pasture it or to use it as a place for keeping or feeding stock or farm animals: *Truax v. Gregory*, 196 Ill. 83, 63 N. E. 674. The owner of the right of way has no right

to fence it in such manner as to cut off the grantor's access to it, and to his other property: *Moffit v. Lytle*, 165 Pa. St. 173, 30 Atl. 922. And, if the right is gained by prescription, the owner of the way has no right to cut ditches for its improvement without the consent of the owner of the soil, unless he has acquired such right also by prescriptive use: *Capers v. M'Kee*, 1 Strob. 164. If the maintenance of a railing along the right of way is reasonably necessary to its use, the owner of the way may erect and maintain such railing: *Chandler v. Goodridge*, 23 Me. 78; *Baldwin v. Boston etc. R. R.*, 181 Mass. 166, 63 N. E. 428. It must be erected in such manner, if possible, as not to prevent the use of the way in a reasonable manner by the owner of the servient estate: *Chandler v. Goodridge*, 23 Me. 78. An owner of a private way is entitled to its unobstructed use for its full width and to remove therefrom anything in the way of an obstruction which materially interferes with the use by him for the purposes for which it was created. In removing such obstructions he does not become a trespasser: *Patout v. Lewis*, 51 La. Ann. 210, 25 South. 34; *Cayes v. De Vito*, 141 Mass. 233, 4 N. E. 828; *Freeman v. Sayre*, 48 N. J. L. 37, 2 Atl. 650.

**d. Right to Extend Use to Other Land.**—A right of way over the land of another to a particular piece of land cannot be enlarged and extended to other adjoining parcels of land. In other words, a grant or reservation of a right to pass upon a private way to one lot of land does not confer the right to pass further upon the same way to another lot of land: *Farley v. Bryant*, 32 Me. 475; *Davenport v. Lamson*, 21 Pick. 72; *Mendell v. Delano*, 7 Met. 176; *Rexford v. Marquis*, 7 Lans. 250; *Franch v. Marstin*, 32 N. H. 316; *Springer v. McIntire*, 9 W. Va. 196. A right of way appurtenant to a particular lot cannot lawfully be used as a mode of access to another lot to which it is not appurtenant: *Shroder v. Brenne-man*, 23 Pa. St. 348. A right of way appurtenant to a lot cannot be used for the purposes and benefit of another lot, to which no such right is attached, even though such other lot is adjoining, and within the same inclosure with that to which the easement belongs: *Albert v. Thomas*, 73 Md. 181, 20 Atl. 912. And a right to use a way from a common to a boundary line of a particular lot will not authorize its use for communication with an adjacent lot: *Rexford v. Marquis*, 7 Lans. 250. If an owner of land conveys in one deed a part thereof, and a right of way over the other part obviously useful and necessary to the beneficial enjoyment of the land granted, the grantee takes such right of way as appurtenant to the land granted only, and cannot, by reservation in a subsequent conveyance of such land, enlarge such right of way or extend it to other lands owned by him: *Reise v. Enos*, 76 Wis. 634, 45 N. W. 414. It is a general rule that the owner of a right of way cannot use it as a means of access to other land to which it is not appurtenant:

Coleman's Appeal, 62 Pa. St. 252. Hence, if a grantee reserves a right of way as appurtenant to the land granted alone, he has no right to extend it to land subsequently acquired, no matter whether the latter land is adjoining or is a distinct tract: *Dexter v. Tree*, 117 Ill. 532-540, 6 N. E. 506; *Stearns v. Mullen*, 4 Gray, 151; *Greene v. Canny*, 137 Mass. 64; *Brightman v. Chapin*, 15 R. I. 166, 1 Atl. 412. A grant "of liberty to pass and repass over my land where it is necessary," confers a right of way to and from those lands only which the grantee owns at the date of the deed: *Smith v. Porter*, 10 Gray, 66. A grant of a right of way to take coal from certain land cannot be extended by the grantee or his successor in title so as to take over such right of way coal from an adjoining tract subsequently acquired: *Webber v. Vogel*, 159 Pa. St. 235, 28 Atl. 226. If the grantor bound land conveyed by him by roads, whether existing or to be made over land retained by him, he conveys to the purchaser as incident to the grant a right to use such roads when they adjoin the premises, and, if necessary out to the common highway, but such right cannot be extended to separate and distinct premises. To them the right is distinct and not appurtenant and cannot be exercised without a separate grant: *Badeau v. Mead*, 14 Barb. 328.

**e. Right and Duty to Construct or Repair.**—The grantor of a private way is not bound by implication to construct or keep it in repair: *Walker v. Pierce*, 38 Vt. 95. This duty devolves upon the grantee or owner of the way, and he must keep the roadway in repair: *Wynkoop v. Burger*, 12 Johns. 222; *Holmes v. Seely*, 19 Wend. 507. A right of way, whether by grant or prescription, carries with it as incident thereto the right and duty to enter and make repairs and to remove all obstacles to its enjoyment: *Mc-Millan v. Cronin*, 75 N. Y. 474. The owner of the right of way may do whatever is reasonably necessary to make the way suitable and convenient for his use. Hence, he may enter upon the land and construct such roadway as he desires and keep it in repair: *Nichols v. Peck*, 70 Conn. 439, 66 Am. St. Rep. 122, 39 Atl. 803; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800, 23 N. E. 442. The grantee of right of way is authorized to enter the land and properly fit the way for travel, as a private roadway, by plowing, graveling and grading it: *Hotchkiss v. Young* (Or.), 71 Pac. 324. The owner of the right of way may disturb the soil therein for the purpose of constructing a roadway therein or keeping it in repair, provided that in so doing he makes no material change in the condition of the way nor interferes with the estates of others therein: *Brown v. Stone*, 10 Gray, 61, 69 Am. Dec. 303. He may dig up and use the adjacent soil for the purpose of repairs whenever there is no other mode of making them: *Thompson v. Uglow*, 4 Or. 369. The grantee of a road or way of a specified width, without restrictions, may use the entire width of the way, and is not

confined to a road of a necessary or convenient width even, and such grantee is not restricted to the mere right of passage over the natural surface of the land within the boundaries of the way, but can construct over the entire width a road suitable, in material, grade, surface and other respects, for the convenient enjoyment of the grant according to attendant circumstances: *Rotch v. Livingston*, 91 Me. 461, 40 Atl. 426; *Brown v. Stone*, 10 Gray, 61, 69 Am. Dec. 303. Any one of the several owners of such a right of way may, at his own expense, fit the way for his convenient use, but not so as to materially impede any other owner in his convenient use of the way. And when all of the owners of an easement in such a way have constructed through the middle thereof a narrower road of an agreed grade, materials and surface, without stipulating that such road shall not thereafter be widened, a subsequent widening of the road by a single easement owner, even to the full width of the way with the same grade, materials, etc., is, in the absence of qualifying and special circumstances, a reasonable exercise of his right: *Rotch v. Livingston*, 91 Me. 461, 40 Atl. 426. "It is well settled that where there are several owners in common of a private way each owner may make reasonable repairs which do not injuriously affect his co-owners, but he cannot make any alteration of the course of the way, or any change in its grade or surface which makes the way less convenient and useful to any appreciable extent, to anyone who has an equal right in the way." This rule applies as well to the owner of the fee in the land as to the owners of the right of way, and one of such owners cannot raise the grade of the right of way so as to make its use more inconvenient to the owner of the land by requiring him to erect steps in order to reach the way: *Killion v. Kelley*, 120 Mass. 47-52.

**f. Right to Fence.**—Undoubtedly, the better rule is that the owner of the way has no right to inclose such way with fences. "The owner of the soil has all the rights and benefits of ownership consistent with such easement. Among others must be the right to have his lands fenced or unfenced at his pleasure": *Brill v. Brill*, 108 N. Y. 511-517, 15 N. E. 538. The same rule is expressed in *Sizer v. Quinlan*, 82 Wis. 390, 33 Am. St. Rep. 55, 52 N. W. 590, where it is said: "If the plaintiff is allowed to fence in his right of way, it will work, it is manifest, an exclusion of the defendant from the land over which it passes, the full legal title to which still remains in him, which was not contemplated by the language used in the deed reserving the right of way or by the deed conveying it to the plaintiff, and would permit the plaintiff to exercise rights and avail himself of methods of use and enjoyment of the defendant's estate of a more permanent character than a mere right of way over his lands, and not essentially pertaining to or resulting from a mere easement over them": *Sizer v. Quinlan*, 82 Wis. 390, 33 Am. St. Rep. 56, 52 N. W. 590.



In the case of *Harvey v. Crane*, 85 Mich. 316, 48 N. W. 582, the contrary rule is laid down, and it is there maintained that the rights of the owner of the easement are paramount to the extent of the grant to those of the owner of the soil, and that the mere grant of a right of private way gives to the grantee the right to fence the right of way, when this is necessary and incidental to the reasonable enjoyment of road privileges on such way.

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## INDIANAPOLIS ABATTOIR COMPANY v. TEMPERLY.

[159 Ind. 651, 64 N. E. 906.]

**LANDLORD AND TENANT—Use of Premises by Landlord.**—If a landlord occupies a portion of the leased premises himself he is not permitted to use such part in such manner as to injure his tenant. (p. 332.)

**LANDLORD AND TENANT—Liability of Landlord for Natural Gas Explosion.**—A landlord who occupies a portion of a building and pipes it for natural gas for his sole benefit, and not for the use of his tenant occupying other portions of the same building, is bound to use ordinary care to prevent the escape of gas, and knowing of the escape of gas through defective pipes, he is liable to the tenant who is without fault for any injury resulting to him therefrom. (p. 332.)

**LANDLORD AND TENANT—Liability of Landlord for Gas Explosion—Pleading.**—If a tenant occupying part of a building is injured by an explosion of natural gas escaping from defective pipes placed in the building by the landlord for his sole use and benefit, and not for the use of the tenant, the doctrine of assumed risks does not apply, and it is sufficient for the tenant to allege that the injury occurred to him without his contributory fault or negligence. (p. 333.)

**TRIAL—Answer to Interrogatories** by the jury that there is no evidence of the facts so expected to be proved, is equivalent to a finding against the party propounding such interrogatories. (p. 334.)

**LANDLORD AND TENANT—Liability of Landlord for Gas Explosion.**—If a landlord rents a room in which he has gas pipes placed for his sole benefit and use in another part of the building occupied by himself, and has notice that gas is escaping from such pipes, his duty to prevent the escape of gas does not depend upon his superior knowledge, or means of knowledge, as to the condition of things in the tenant's room. Under such circumstances it is the duty of the landlord to take such measures to prevent injury to his tenant as a person of ordinary prudence, dealing with an agent as dangerous as gas, would adopt. (p. 336.)

W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller, for the appellant.

W. N. Harding, A. R. Hovey and C. S. Wiltsie, for the appellee.

**652** DOWLING, C. J. The appellant, which was the defendant below, was the owner of certain grounds and structures in the suburbs of the city of Indianapolis, one of which buildings was used for the purposes of cold storage. It was divided into rooms or compartments, which were rented to divers persons for the storage and preservation of meats and other articles by the use of cold air. The several buildings on the grounds were detached from each other, and separated by considerable spaces; one of them, quite remote from that used for cold storage, being occupied by appellant as its office. The appellant caused gas-pipes to be run up the side of the cold storage building, and through the lofts of the compartments rented to the tenants of these rooms, to its office, for the exclusive use of such office. The appellee rented and occupied one of the rooms in the cold storage building for the storage of fresh meats. On February 13, 1895, the room so used by the appellee had, without **653** his knowledge, become filled with natural gas which escaped from the said pipes at some point on the said premises. The appellee, on entering the room on the morning of that day, and while it was yet dark, struck a match to light a candle. A violent explosion from the ignition of the gas instantaneously took place, and the appellee was severely injured thereby. He brought suit to recover damages for the injuries alleged to have been sustained, charging in his complaint that the accident was occasioned by the negligence of the appellant in so constructing and maintaining the gas-pipes that gas leaked from them and escaped into the room rented by him. He alleged that the appellant had notice of the defective condition of the said gas-pipes, but that he had not, and that the accident and injury occurred without fault on his part. The answer of the appellant was a denial. The case was tried by a jury, which returned a general verdict for the appellee, with answers to a great number of questions of fact. The court overruled the motions of the appellant for judgment in its favor on the answers to the questions of fact and for a new trial. Judgment was rendered on the verdict and the abattoir company appealed.

We are asked to reverse the judgment because of the supposed errors of the trial court in its rulings on the demurrer to the complaint, and on the motions for judgment and for a new trial.

The first objection taken to the complaint is that it does not appear that the appellant, as landlord, violated any duty

which it owed to the appellee as its tenant. While it is true that in this state a landlord cannot be compelled to make repairs in the absence of an agreement to do so, and is not responsible for injuries resulting from such failure to repair, yet it is equally well settled that where he occupies a portion of the premises himself he is not permitted to use such parts in such manner as to injure his tenant. In the present case it is alleged that the appellant piped the <sup>654</sup> premises for its own benefit solely, and not for the convenience or use of the appellee. It is perfectly clear that in so doing and in maintaining the gas-pipes it was bound to use ordinary care to prevent the escape of gas from them, and consequent injury to the appellee. It is averred that the gas-pipes laid down and maintained by the appellant for its own use were defective and leaking, and that this fact was known to the appellant. The appellant must be presumed to have known the dangerous qualities of escaping natural gas, and if, with the knowledge that it was escaping, it permitted such leakage to continue until an explosion took place, the injured tenant being without fault, the landlord would be liable: *Peil v. Reinhart*, 127 N. Y. 381, 27 N. E. 1077, *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293.

The appellant owed to the appellee the duty to use ordinary or reasonable care to prevent the escape of gas from its pipes in such quantities as to become dangerous to life or property: *Kimmell v. Burfeind*, 2 Daly (N. Y.), 155; *Mississinewa etc. Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203 and note; *Consumers Gas etc. Co. v. Perrego*, 144 Ind. 350, 43 N. E. 306; *Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N. E. 1049; *Citron v. Bayley*, 36 App. Div. 130, 55 N. Y. Supp. 382; *Consolidated Gas Co. v. Crocker*, 82 Md. 113, 33 Atl. 423; *Hunt v. Lowell Gas Light Co.*, 3 Allen 418; *Kibele v. City of Philadelphia*, 105 Pa. St. 41; *Parry v. Smith*, L. R. 4 C. P. Div. 325, 41 L. T., N. S., 93; *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355, 34 Am. St. Rep. 653, 25 Atl. 522.

If it was necessary to aver want of knowledge of the escape of the gas on the part of the tenant, we think the allegation on that subject was sufficient. The averment was "that appellee, on the day of his injury, without negligence, and not knowing that said gas had escaped and filled his room, and not knowing the danger of so doing, entered <sup>655</sup> the room in which said gas was confined," etc. We are of the opinion that in cases of this character the doctrine of assumed risk does not apply, and that

it is sufficient to allege that the injury occurred without contributory fault on the part of the appellee. Besides, nothing in the complaint shows that the appellee knew that the pipes were defective, or that any gas had escaped from them, and we cannot presume, from anything we find in the complaint, that he had such knowledge. The complaint was sufficient, and the demurrer to it was properly overruled.

In the discussion of the motion for judgment for the appellant upon the answers to the interrogatories, we have been referred by counsel to no answer which necessarily overthrows the general verdict. If it appeared from an answer that at the time of the explosion the appellee was not the tenant of the appellant, or that the appellant maintained no gas-pipes upon its premises, or that no leak existed in its pipes, or that the appellee, when he struck the light, knew that the room contained gas to a dangerous extent, or that the appellee was not injured by the explosion, such an answer would have been irreconcilable with the general verdict upon any theory, and would have overthrown it. But this is not character of the answers upon which we are asked to reverse the judgment of the trial court. The plugging of a disused tin spout or pipe through which another tenant thought that escaping gas from outside the cold storage building or some other unpleasant odor found its way into the room occupied by him, is relatively of no importance in this case. A plug in that pipe did not stop any leak in the gas-pipes, and it was not the exercise of ordinary care to attempt to shut off the escaping gas by that expedient.

We set out a few of the interrogatories relied upon by appellant, with the answers to the same: "17. Did said Bryan [another tenant of the cold storage building, occupying the compartment next to that held by the appellee] ask <sup>656</sup> for a workman to stop a pipe in his room through which said Bryan believed gas might be coming into his room? A. Asked Mr. Alerdice [the president of the appellant] to have leak stopped." "20. Did the abattoir company send one George Wonders to do such work as said Bryan wanted done, in response to his request? A. Yes." "29. After said plugging, did the officers of the abattoir company believe that there was no further danger from gas? A. No evidence. 30. Did said officers have good reason so to believe? A. No evidence." "46. Did any officer of the abattoir company have any means of knowing that there was gas in the particular room where plaintiff kept his meat



on the morning of the accident to plaintiff? A. No evidence.” “51. Did the officers of the abattoir company go about the outside of its building and examine by the sense of smell to find escaping gas? A. Yes. 52. Upon such examination, was any place discovered near the buildings where escaping gas could be smelled? A. No evidence.”

These answers, so far from supporting the proposition that judgment should have been rendered for the appellant, strongly tend to sustain the general verdict. They show that a short time before the accident the appellant had notice that gas was escaping in the vicinity of the warehouse and that the president of the company was notified to have “the leak stopped.” They show what steps were taken by the appellant to protect its tenants from the dangers of escaping gas. The jury may have thought, and doubtless did believe, that these measures, both of investigation and prevention, were crude and grossly inadequate in view of the possible dangers involved. Interrogatories numbered twenty-nine and thirty were intended to elicit answers favorable to the appellant. The response of the jury that there was “no evidence” of the facts so expected to be proved was in each instance equivalent to a finding against the appellant.

657 If, in answer to the forty-sixth interrogatory, the jury had said that “no officer of the abattoir company had any means of knowing that there was gas in the particular room where plaintiff kept his meat on the morning of the accident,” we do not perceive how that answer would have aided the appellant. Its liability did not depend on notice of the fact that on the morning of the accident gas had accumulated in that room, but upon its previous knowledge that an insidious and deadly fluid had escaped at some point, probably upon its premises; that it was flowing in greater or smaller quantities by day and by night; that it was liable to penetrate any room in the building, and accumulate there when the room was tightly closed, and to ignite and explode with terrific force upon contact with the flame of a match or candle.

“38. Was there gas in plaintiff’s room when he opened the door on the morning of the accident in such quantities as to explode when fire came in contact with it? A. Yes. But the door was opened by Thorne. 39. Could such gas have been readily smelled when the door was opened by anyone giving attention to his surroundings? A. Yes.” These answers prove no fact inconsistent with the general verdict. They establish

the charge of the complaint that the room rented by the appellant to the appellee had become filled with gas, and that it was ready to explode upon contact with fire. They state that when the door of the room was opened by anyone giving attention to his surroundings, gas could readily have been smelled. But they disclose, also, that the door was opened, not by the appellee, but by a man named Thorne. Just what was meant by "giving attention to his surroundings" is not evident. It would seem to indicate something more than the ordinary care which a tenant is required to take in entering a room rented to him. The tenant was not obliged to make tests for the presence of gas or anything else. He had the right to presume that his <sup>658</sup> room was free from noxious substances, and to enter it freely. His attention might have been fixed upon his business; his sense of smell, or ability to investigate odors, may have been obtuse. But, if any conclusion favorable to the appellant could have been drawn from these answers, their effect was completely neutralized by the answer to the forty-fourth interrogatory, which seems to be directly contradictory of the answer to No. 39. The former was as follows: "44. At the time the plaintiff lighted the match, could he have smelled gas if he had been giving attention to his surroundings? A. No." Even if the answer to the thirty-ninth interrogatory had been of controlling effect if standing alone, its inconsistency with the forty-fourth would have left the verdict unaffected: *Dickey v. Shirk*, 128 Ind. 278, 27 N. E. 733; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58, 36 N. E. 529; *Ohio etc. R. Co. v. Heaton*, 137 Ind. 1, 35 N. E. 687.

All of the answers to the questions of fact submitted to the jury are easily reconciled with the general verdict without the aid of the evidence admissible under the issues which may be presumed to have been presented to the jury: *Louisville etc. Ry. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *British-American etc. Co. v. Wilson*, 132 Ind. 278, 31 N. E. 938.

The motion for a new trial presents but two questions: 1. That of the sufficiency of the evidence to sustain the verdict; and 2. That of the correctness of the instructions referred to in the motion. A very careful reading of the record satisfies us that there was not a total failure of proof upon any issue in the cause. The knowledge of the appellant of the escape of gas, the sufficiency of the means adopted to discover and stop it to

relieve the appellant of the charge of negligence, the knowledge or ignorance of the appellee of the perils of the situation when he entered his room—all of these were matters of fact upon which there was more or less evidence before the jury. This being the state of the record, the verdict must stand.

659 Neither the third instruction nor the seventh was erroneous because of its omission of the statement that the appellee could not recover unless he proved that he did not voluntarily assume the risk arising from the escape of the gas. The question of assumption of risk was not involved.

The eighth instruction requested by the appellant contained these words: "Unless the defendant had some superior knowledge, or means of knowledge, not possessed by the plaintiff as to the condition of things in his room, it was under no duty to make any changes with respect to gas about its premises." The duty of the appellant did not depend upon its superior knowledge, or means of knowledge, as to the condition of things in appellee's room. If it had notice that gas was escaping from its pipes on its premises in the vicinity of the building used for cold storage, in which appellee had a rented room, and could foresee that it was likely to enter that building and appellee's room, its duty to its tenant required that it should find the leak and stop it, or cause the gas to be shut off until the leak could be found, or to take such other precautions to prevent injury to its tenant as a person of ordinary prudence, dealing with so dangerous an agent as natural gas, would adopt.

The modifications of instructions numbered twelve and thirteen by the court were reasonable and proper. Without such corrections, these instructions misstated the law, and did not fairly present the issues to which the law so stated was intended to apply. We find no error in the action of the court in refusing to give these instructions as presented, or in modifying them as it did.

There is no error in the record. Judgment affirmed.

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*Gas.*—*Higher Degrees of Care* and vigilance are required in dealing with a dangerous agency, such as gas, than in the ordinary affairs of life or business; and, while no absolute standard of duty in dealing with such agencies can be prescribed, every reasonable precaution suggested by experience and the known dangers of the subject must be taken: *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443, 50 Atl. 994, 88 Am. St. Rep. 819, and cases cited in the cross-reference note thereto. As to the liability of a gas company to a

landlord when his tenant carelessly ignites gas that has escaped from a service pipe, see *Creel v. Charleston Natural Gas Co.*, 51 W. Va. 129, 90 Am. St. Rep. 772, 41 S. E. 174.

*The Liability of a Landlord* letting premises in a defective and dangerous condition is discussed in the monographic note to *Willcox v. Hines*, 66 Am. St. Rep. 785-789. That a landlord may be liable to his tenant for injuries suffered from defective or dangerous premises, see *Hamilton v. Feary*, 8 Ind. App. 615, 52 Am. St. Rep. 485, 35 N. E. 48; *Coupe v. Platt*, 172 Mass. 458, 70 Am. St. Rep. 293, 52 N. E. 526. The liability to third persons of lessors of property is discussed in the monographic note to *Griffin v. Jackson Light etc. Co.*, 92 Am. St. Rep. 499-559.

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CASES  
IN THE  
COURT OF APPEALS  
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KENTUCKY.

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MILLER v. MALONE.

[109 Ky. 133, 58 S. W. 708.]

**DEVISE**—When to be Regarded as of the Proceeds of the Land and Not of the Land Itself.—A devise of land to an executor to be sold and the proceeds to be divided among specified beneficiaries is not a devise of the land, but of the proceeds only. (p. 540.)

**LEGACY OR DEVISE**—Ademption of.—If lands are devised to an executor, with a direction that he sell and divide the profits among certain legatees, and the lands are sold by the testator in his lifetime this does not operate as an ademption of the legacies, where, after such death, there is no difficulty in identifying the proceeds of the property or some part thereof. (p. 541.)

J. C. Force and Beard & Marshall, for the appellants.

Willis & Willis, for the appellees.

**134** **PAYNTER, J.** Ann Miller, a maiden lady, died testate in Shelby county, Kentucky, possessed of a large estate. The important question presented on this appeal is as to the proper interpretation of items 25 and 31 of her will. Item 25 reads: "I give and devise my house and lot in Shelbyville, Kentucky, in which C. E. Fullenwider now resides, to my executor, **135** in trust to sell same and divide the proceeds of such sale among the children of H. C. Melone who may be living at the time of my death, and the lawful issue, if any, of such as may thereto-

fore have died; such issue to take the share their parents would have taken if living. The purchaser of said property shall not be required to look to the application of the purchase money, and my executor shall have such powers and rights in respect thereto as are conferred on him by the thirty-first item of this will with respect to my real estate generally. In addition to the foregoing devise, I give to my executor, upon the same trusts and for the same purposes as above stated, one thousand dollars."

Item 31 reads: "I devise all of my real estate, wherever situate, to my executor, to be sold at such time and on such terms as may, in his discretion, be best for my estate—the proceeds of such sale or sales to be applied, as directed in this will, to the payment of my debts, funeral expenses, and the legacies herein given, and the proper costs and charges of administration; and he is hereby invested with power in making said sales and investments." The children of H. C. Melone were not heirs of the testatrix. They were strangers to her blood. After the testatrix made her will, she sold the house and lot mentioned in item 25, received two hundred dollars in cash, and took notes payable to herself for the balance of the purchase money, and those notes were in her possession at her death.

The rule of the common law was that a sale by a testator, subsequent to the making of his will, of land devised by it, operated as a revocation or an ademption of the legacy. This rule with reference to the ademption of legacies still prevails in Kentucky, except to the extent the statute has worked a modification to it: *Haselwood v. Webster*, 82 Ky. 409. Under section 2068 of the Kentucky <sup>136</sup> Statutes, the conversion in whole or in part of money or property, or the proceeds of property, devised to one of the testator's heirs into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise, unless the testator so intended, but the devisee shall receive the value of such devise, unless a contrary intention on the part of the testator appear from the will or by evidence. Section 4835 of the Kentucky Statutes is to the effect that neither a conveyance nor any other act subsequent to the execution of a will, except a revocation of it, shall prevent its operation with respect to such interest in the estate that the testator may have to dispose of at the time of his death. If a testator disposes of part of the estate devised, and retains the balance, the will operates as to

that; or if he should own, at the time the will was made, property, and subsequently sell it, and then regain it before his death, it would operate upon it. By section 4839 of the Kentucky Statutes, unless a contrary intention shall appear by the will, it shall be construed with reference to the estate devised, to speak and take effect as if it had been executed immediately before the death of the testator. These provisions of the statute have not modified the common-law rule announced so as to affect the question here involved, except it be a bequest of the proceeds instead of the house and lot. If the former be true, then the conversion of two hundred dollars of the proceeds of the sale of the testatrix would not prevent the balance of it from passing under the will. The modification of the common-law rule in section 2068 of the Kentucky statutes does not render the rule inapplicable to this case, because the Melones were not heirs of the testatrix. If the house and lot were devised, it was specific in character, and the disposition of it by the testatrix in her <sup>137</sup> lifetime would have been an ademption of it. So far as we are aware, the authorities universally sustain that conclusion. Our opinion is that it was not a devise of the house and lot, but of the proceeds. The testatrix devised the house and lot "to my executor in trust to sell same and divide the proceeds of such sale among the children of H. C. Melone." The children did not acquire title to the property under the will, could not have had any use or possession of it, nor made any disposition of it, nor conveyed the fee, as it was in the executor, with the direction to dispose of it "and divide the proceeds." In item 31 of the will the executor is directed to sell "all my real estate." If the house and lot had been specifically devised to the children we would not hold that the language used in item 31, directing the executor to dispose of all her real estate affected that devise; but reference is made to it to show that the scheme of the testatrix was to have her real estate converted, and proceeds distributed. That that was her plan, item 32 of her will gives evidence, because it reads: "If after all my estate is converted into money, as hereinbefore directed," etc. This quotation from the will is made to show that the purpose was to have all her estate converted. Did the fact that the testatrix in her lifetime converted the house and lot into proceeds, instead of leaving that duty to be performed by the executor, deprive the Melone children thereof? At the death of the testatrix there was no

trouble to identify the remaining part of the proceeds of the house and lot. The substance of the bequest remains, and her act simply facilitated the testator in carrying out the provisions of the will. There is a class of cases which do not fall within the rule of ademption, and in speaking of them 1 Rop. Leg., 246, says: "Where the terms of the bequest are so comprehensive <sup>138</sup> as to include within their compass the fund specifically bequeathed, although it has undergone considerable alteration since the date of the will. For since the substance of the thing given, viz., the debt or money, remains, and the subsequent alteration of security does not prevent it from answering the description in the will, the principles upon which the ademption of the specific legacies is founded do not apply." In *Nooe v. Vannoy*, 59 N. C. 185, the testator used this language: "I further give to my children by a former marriage the proceeds of the sale of my town property in the town of Wilkesboro, or so much thereof as is herein specified, to wit, to my son Joel Alfred two hundred dollars," etc. The testator sold the property mentioned, and it was claimed that the sale was an ademption of the legacy. The court said: "As the proceeds of the sale of the property is given, it follows that, if such part thereof as is specified can be traced out and identified at the time of the death of the testator, the legacy will take effect, and there will be no ademption, or only a partial one. The distinction between a gift of the property itself, and a gift of the value of the property, or in the proceeds of the sale of the property, is well settled." In *Gardner v. Printup*, 2 Barb. 83, it appeared that the testator bequeathed to certain grandchildren the proceeds of a bond and mortgage he held against certain persons (naming them). The bond was for eight thousand dollars, and the testator instituted a proceeding to collect the mortgage, and to satisfy which the property was sold, and part of the purchase money was paid, and bonds taken for the balance of the purchase money. This bond for the purchase money remained unpaid at the death of the testator. The court held that it was not an ademption of the legacy.

<sup>139</sup> Our conclusion is that the testatrix devised the proceeds of the house and lot to the Melone children; that the proceeds which she had at the time of her death go to them; that her act in converting the house and lot into proceeds, instead of waiting for the executor to do so, was not an ademption of the legacy. The judgment is affirmed.

Petition for rehearing filed by appellant and overruled.



## ADEMPTION OF LEGACIES.\*

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\*REFERENCE TO MONOGRAPHIC NOTES.

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“Ademption is the technical term used to describe the act by which a testator pays in his lifetime to his legatee a general legacy which, by his will, he had proposed to give him at death; or else the act by which a specific legacy has become inoperative on account of the testator having parted with the subject”: *Cozzens v. Jamison*, 12 Mo. App. 452. See, also, *Connecticut Trust etc. Co. v. Chase* (Conn.), 55 Atl. 171. Notwithstanding the clearness and conciseness of this definition, it is, nevertheless, often confused with advancement and satisfaction, and used interchangeably with these terms. The doctrine of advancement applies only in cases of intestacy, or where the testator in his will has directed that property given to his children in his lifetime should be accounted for by them: *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716; *McFall v. Sullivan*, 17 S. C. 504. The distinction between ademption and satisfaction is pointed out by Lord Romilly to be as follows: “In ademption, the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may, either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word ademption, because the bequest or devise contained in the will is thereby adeemed that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he gives benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant, or whether they will take under the will. Therefore, this distinction is manifest. In cases of satisfaction the person intended to be benefited by the covenant, who, for

shortness, may be called the objects of the covenants, and the persons intended to be benefited by the bequest or devise—in other words, the objects of the bequest must be the same. In cases of ademption they may be, and frequently are, different”: *Chichester v. Coventry*, L. R. 2 H. L. Cas. 17. And see *Tussaud v. Tussaud*, 9 Ch. Div. 363; *Cooper v. McDonald*, L. R. 16 Eq. 258.

The doctrine of ademption has no application to property taken by descent, but only to that taken by devise: *Stokesberry v. Reynolds*, 57 Ind. 425.

## II. Ademption by Advancement.

### a. To the Testator's Children.

**1. The Rule Stated.**—One of the most common modes of ademption is by the advancement of a portion to a legatee by one standing in loco parentis to him. It is universally recognized as the common law that where, in such cases, an advancement takes place, it is the presumption that it is intended in lieu of the legacy, which is to be regarded as a portion; and the reason for this rule is stated in *Richardson v. Eveland*, 126 Ill. 37, 18 N. E. 308, as follows: “The rule is based upon the equitable presumption that a parent, or one standing in loco parentis, and owing a like natural duty to all of his children, would not, after having voluntarily established the portion each should receive of his estate, take from one to his detriment, for the purpose of benefiting another. The natural obligation of the parent to provide for his offspring is an imperfect obligation, and the portion of each child remains wholly under the control of the testator, and may be changed at his pleasure. The rule is based upon the presumed intention of the testator, where he owes a like common obligation to all, not to give one of the objects of his bounty a double portion of his estate to the injury of the others. The rule was created by courts of equity on account of their leaning, as it is said, against double portions, and to facilitate the equitable distribution of estates. Hence, if a legacy be given by a parent, or one standing in loco parentis, and the testator afterward makes an advancement, or gift, or money, or property ejusdem generis, to the same beneficiary, the presumption will arise that the gift was intended in satisfaction of, or substitution for, the prior legacy, and unless this presumption be rebutted, an ademption in full, or pro tanto, as the gift is equal to, or less than, the prior benefit, will take place. When the equitable presumption arises, and the rule applies, the ademption, in whole or in part, is complete by the act of the donor in conferring the two benefits, from which the intention of substitution is implied.” In accord with this are *Rogers v. French*, 19 Ga. 316; *Haywards v. Loper*, 147 Ill. 41, 35 N. E. 798; *Low v. Low*, 77 Me. 37; *Wallace v. DuBois*, 65 Md. 153, 4 Atl. 402; *Paine v. Parsons*, 14 Pick. 318; *Van Houten*

v. Post, 32 N. J. Eq. 709, 33 N. J. Eq. 344; Langdon v. Astor, 16 N. Y. 9, 3 Duer, 477; Matter of Townsend, 5 Dem. (N. Y.) 147; Hine v. Hine, 39 Barb. 507; Gill's Estate, 1 Pars. Eq. Cas. (Pa.) 139; Swoope's Appeal, 27 Pa. St. 58; Watson v. Lincoln, Amb. 325; Clarke v. Burgoine, Dick. 353; Suisse v. Lowther, 2 Hare, 424; In re Peacock's Estate, L. R. 14 Eq. 236; Hopwood v. Hopwood, 7 H. L. Cas. 728; Pym v. Lockyer, 5 Mylne & C. 29; Booker v. Allen, 2 Russ. & M. 270; Platt v. Platt, 3 Sim. 503; Scotton v. Scotton, 1 Strange, 235; Barrett v. Rickford, 1 Ves. Sr. 510; Ellison v. Cookson, 1 Ves. Jr. 100; Hincheliffe v. Hincheliffe, 3 Ves. Jr. 516; Trimmer v. Bayne, 7 Ves. Jr. 508; Robinson v. Whitley, 9 Ves. Jr. 577; Hartopp v. Hartopp, 17 Ves. Jr. 184.

2. **Occasion for the Gift.**—The most usual event upon which an advancement is held to work an ademption of the bequest is the marriage of the legatee: Roberts v. Weatherford, 10 Ala. 72; Paine v. Parsons, 14 Pick. (Mass.) 318; Richardson v. Richardson, Dud. Eq. (S. C.) 184; Hartop v. Whitmore, 1 P. Wms. 681; Dawson v. Dawson, L. R. 4 Eq. 504; Nevin v. Drysdale, L. R. 4 Eq. 517; Carver v. Bowles, 2 Russ. & M. 301; Jenkins v. Powell, 2 Vern. 115. It is, however, not necessary that the gift be made on marriage or any other special occasion with reference to the donee: Leighton v. Leighton, L. R. 18 Eq. 458; and where a father declared that his daughter should have more on his death, a gift upon her marriage is no satisfaction of a prior legacy: Debeze v. Mann, 2 Bro. C. C. 165, 1 Cox, 346.

3. **Education.**—Money expended on the education of a child during the testator's lifetime, whether general or professional, is not an advancement within the meaning of the rule: Bird's Estate, 132 Pa. St. 164, 19 Atl. 32; Cooner v. May, 3 Strob. Eq. (S. C.) 185; White v. Moore, 23 S. C. 456.

4. **Small Advances.**—For an advancement to work an ademption, it must be certain, and not merely contingent, and be of the same character as the legacy: Benjamin v. Dimmick, 4 Redf. (N. Y.) 7; but small gifts of money, made from time to time are not to be taken into account: Schofield v. Heap, 27 Beav. 93; Watson v. Watson, 33 Beav. 574; In re Peacock's Estate, L. R. 14 Eq. 236. So, where there is a great disparity between the gift made inter vivos and the legacy, the latter being largely in excess of the former, such gift will not be regarded as a portion, or an advancement so as to work an ademption, in the absence of any showing of the testator's intention to that effect: State v. Crossley, 69 Ind. 203.

The advancement must be one for the benefit of the legatee in fact, and not merely colorable; so where a testator gave his daughter an unconditional bond, payable immediately, but he always kept it, his object being to screen himself from taxes, and it was so regarded by the daughter, and by will he gave portions to all his daughters, it was held that, upon his death, it should be set aside,



and that that daughter might take with the rest: *Ward v. Lant*, Prec. Ch. 182.

**5. Imperfect Gift.**—The gift made may also be an imperfect one and be perfected by will, as where the will recites that the testator has given all he intended to give to certain legatees, and taken their notes therefor, which the executors were directed to deliver up as satisfied and discharged; this was held to operate as a gift to one of the legatees of a note executed by him for money not at the time intended as a gift, and which both maker and payee expected to be paid: *Tillotson v. Race*, 22 N. Y. 122; and see, also, *Lawrence v. Mitchell*, 48 N. C. (3 Jones L.) 190.

**b. To Strangers.**—The rule holding that advancements to children by one standing in loco parentis is peculiar in this, that strangers are more favored than the testator's own children, for gifts to the former can in no wise be considered a portion, but rather a bounty, and so they are held to be, not in satisfaction of a legacy given by a prior will, but cumulative, and the presumption is in favor of the latter: *Rogers v. French*, 19 Ga. 316; *Richardson v. Eveland*, 126 Ill. 37 18 N. E. 308; *Evans v. Beaumont*, 4 Lea (Tenn.), 599; *Powel v. Cleaver*, 2 Bro. C. C. 499; *Suisse v. Lowther*, 2 Hare, 424. This rule has been the subject of much adverse criticism on account of its harshness, but has nevertheless been followed as a correct exposition of the common law, unless altered by statute. By statute in Kentucky, strangers and children of the testator were put on the same footing as to advancements: *Duncan v. Clay*, 13 Bush, 48; and in California it is provided that "advancements or gifts are not to be taken as adoptions of general legacies, unless such intention is expressed by the testator in writing": Cal. Civ. Code, sec. 1351; thus removing an unjust presumption against the testator's children.

**c. By Whom and to Whom Made.**—It is not necessary that the advancement be made directly by the testator, so where he procures a third person to convey property to his daughter, for a consideration moving from himself, the presumption is that it is meant in satisfaction of the legacy, the same as when he himself conveys: *Piper v. Barse*, 2 Redf. (N. Y.) 19.

As to whether a gift to a son in law is to be considered as an advancement, there is some conflict of authority. In *Hart v. Johnson*, 81 Ga. 734, 8 S. E. 73, the testator advanced a sum of money equal in amount to a bequest to one of his daughters, to her husband, and it was held to be no adoption, the father not stating whether it was in lieu of the legacy or not. So a conveyance of realty to a son in law was held not to be an advancement to his wife, if not shown to have been so intended: *Rains v. Hays*, 6 Lea, 303, 40 Am. Rep. 39. A simple gift to a husband after marriage does not adeem a legacy to his wife, daughter of the testator, nor does a sum to provide a wedding outfit: *Ravenscroft v. Jones*, 32 Beav. 669.

In *Dilley v. Love*, 61 Md. 603, the court held an advancement by a father in law to the husband of his daughter was an advancement to the latter; and that it was held an *ademption pro tanto* where the testator gave a legacy to his adopted daughter to be paid her on marriage and she marrying during his lifetime, he gave her husband thereafter sums of money from time to time to advance him in business: *Ferris v. Goodburn*, 4 Jur., N. S., 847.

**d. For a Particular Purpose.**—As before stated, where the testator stands neither in a natural nor assumed relation of parent to the legatee, the legacy is considered as a bounty and is not adeemed by a subsequent advancement. This rule is subject to an exception, however, and that is where the legacy is given for a particular purpose, and the testator afterward fulfills it in his lifetime, or gives money to that end: *Hine v. Hine*, 39 Barb. (N. Y.) 507; *In re Ritter's Estate*, 10 Pa. Super. Ct. 352; *Monck v. Monck*, 1 Ball & B. 298. Where, therefore, a testator in his will directs his executors to make good to a client any loss she might sustain by reason of a certain investment which he had made for her, and subsequently to the execution of the will he refunds her the exact amount of the principal, and agrees to have no further claim upon him whatever, she cannot, after his death, recover under the will a loss resulting from costs and taxes, all of which were not referred to in the settlement: *Johnson's Estate*, 201 Pa. St. 513, 51 Atl. 342. See, also, *Keiper's Appeal*, 124 Pa. St. 193, 16 Atl. 744. But where a husband leaves his wife two hundred pounds to be paid ten days after his decease, and several years after, at the request of his wife, during his last illness, she not knowing the contents of the will, he gives her two hundred pounds, so that she might have money immediately on his death without interference of the executors, this is not such a particular purpose as to bring the case within the rule, and the legacy is not adeemed: *Pankhurst v. Howell*, L. R. 6 Ch. App. 136. In *Rosewell v. Bennett*, 3 Atk. 77, the testator provided in his will for three hundred pounds for putting his son as apprentice; in his lifetime he spent two hundred pounds in placing him out as clerk; and it was held that evidence was admissible to show that this was intended as an *ademption*.

A testatrix by her will bequeathed five hundred pounds to a niece of her deceased husband, with these words, "according to the wish of my late beloved husband," and subsequently, during her life, she paid the niece three hundred pounds, making an entry in her diary that such payment was a legacy from the legatee's uncle. The court held the legacy adeemed to the amount of the money advanced: *In re Pollock*, L. R. 28 Ch. Div. 552, in which case the Earl of Selborne, S. C., said: "To constitute a particular purpose within the meaning of that doctrine it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (e.

g., for binding him an apprentice, purchasing for him a house, advancing him upon marriage or the like) should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfillment of some moral obligation recognized by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognized, or would have presumed to exist."

The doctrine of ademption arising from advancement for a particular purpose applies only where the testator gives the legacy for one particular purpose alone and afterward gives a sum of money with the same end in view. So, where a testator left one thousand pounds for the maintenance of his grandson, with directions that the executors might apprentice him, and use the interest on the money therefor, so much as not used to be transferred to him when of age, and the testator, in his lifetime, subsequently apprenticed him and paid out one hundred and twenty-six pounds, this was held no ademption, the money being bequeathed for more than one purpose: *Roome v. Roome*, 3 Atk. 181.

Ademption is merely presumed, in this class of cases, and may be rebutted by evidence: *Monck v. Monck*, 1 Ball & B. 298; and parol evidence is admissible to repel or strengthen this presumption: *In re Ritter's Estate*, 10 Pa. Super. Ct. 352.

#### e. Requisites for Ademption by Advancement to Children.

1. **Portions Ejusdem Generis.**—In order for the doctrine of ademption by advancement to apply, it is necessary that the thing given in satisfaction be of the same nature and equally certain with the thing bequeathed, as land is no satisfaction for money, nor vice versa: *Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498; *Bellasis v. Uthwatt*, 1 Atk. 426, nor is a house for a pecuniary legacy: *Dugan v. Hollins*, 4 Md. Ch. 139; *Swoope's Appeal*, 27 Pa. St. 58.

This rule does not mean that the gift must be in all respects identical with the legacy in order to work a satisfaction of the latter. It is sufficient if substantially the same, and a small variance in the time of payment, or other trifling differences, does not vary the application of the rule: *Hine v. Hine*, 39 Barb. (N. Y.) 507.

Where the testator left his son five hundred pounds by will, and afterward took him into partnership in his jewelry business, the stock of which was worth three thousand pounds, it was held no ademption of the legacy, the gift not being ejusdem generis: *Holmes v. Holmes*, 1 Bro. C. C. 555. So the value of a beneficial lease granted a son was held no satisfaction of a legacy: *Grave v. Salisbury*, 1 Bro. C. C. 425. On the other hand, a bequest of a share in powder works, ten thousand pounds in value, charged with an annuity of twenty pounds for a life was held a satisfaction of a por-

tion of two thousand pounds: *Bengough v. Walker*, 15 Ves. Jr. 507. In *Tuckett-Lawry v. Lamoureux*, 1 Ont. 364, 3 Ont. 577, a Canadian case, a testator gave by will an annuity to each of his two daughters of six thousand dollars. After its execution he gave one daughter, absolutely, bonds sufficient to produce an annual income of twelve hundred dollars, and reduced her annuity to that amount by codicil. Subsequently, he gave the other daughter the same amount of bonds, and instructed his lawyer to alter his will so as to reduce the annuity to that amount, but, on account of his sudden death, it was never done. The court held, in spite of the different natures of the gifts, that the doctrine of ademption applied, and that the second daughter's annuity should be reduced pro tanto, even without evidence of the testator's intention.

Money advanced to a daughter during the lifetime of the testator was held to work an ademption, although the limitations of the settlements were different: *Sheffield v. Coventry*, 2 Russ. & M. 317; the circumstance of the limitations being different not affecting the question: *Durham v. Wharton*, 3 Clarke & F. 146. See, however, *Phillips v. Phillips*, 34 Beav. 19.

A condition attached to a gift may render it not ejusdem generis, as where money is given upon a contingency, as marriage or in case of surviving the testator; in which case it is no satisfaction of a legacy: *Spinks v. Robins*, 2 Atk. 491. Nor is it where the contingency is that she arrive at age: *Bellasis v. Uthwatt*, 1 Atk. 426.

Even though the gift is of a different species from the legacy, if it was the intention of the testator that it should be substituted for the latter, it will be adeemed: *May v. May*, 28 Ala. 141; *Jones v. Mason*, 5 Rand. 577, 16 Am. Dec. 761; *Booker v. Allen*, 2 Russ. & M. 270.

## 2. Who are in Loco Parentis.

**A. Children.**—As a gift to a legatee by one in loco parentis is alone presumed to be in satisfaction of the portion given by will, it becomes necessary to determine who is considered as being in that relation. The rule of ademption by advancement is not favored by law, as the intent of the testator is as often disappointed as served by it: *Powel v. Cleaver*, 2 Bro. C. C. 499; and being technical, is not to be extended: *Watson v. Watson*, 33 Beav. 574. Of course, when the bequest is made by a father to his child no difficulty arises, he standing by nature in loco parentis. The rule has been held not to apply to remote relations, such as a great uncle, where the legatee's father was alive: *Shudal v. Jekyll*, 2 Atk. 516. The fact that the father is alive, however, is not of controlling importance, as in *Pym v. Lockyer*, 5 Mylne & C. 29, the grandfather was in loco parentis, although the father of the child was living. To the same effect, see *Powys v. Mansfield*, 3 Mylne & C. 359.



**B. Grandchildren.**—A grandson stands to a grandfather as a stranger, for the purposes of the rule that satisfaction is to be presumed as advancement: *Swails v. Swails*, 98 Ind. 511, citing *Ex parte Pye*, 18 Ves. Jr. 140; *Richardson v. Richardson*, Dud. Eq. (S. C.) 184; *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716; *Shudal v. Jekyll* 2 Atk. 516; *Powel v. Cleaver*, 1 Bro. C. C. 499; *Lyddon v. Ellison*, 19 Beav. 565. See contra, *Clendening v. Clymer*, 17 Ind. 155; *Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 9.

**C. Natural Children.**—At common law a man did not stand in the relation of parent to his natural child, and on that account such child was favored at the expense of legitimate offspring: *Wetherby v. Dixon*, 19 Ves. Jr. 407, *Cooper*, 279; *Ex parte Pye*, 18 Ves. Jr. 140. In the latter case Lord Eldon condemned this rule, stating that it proceeded upon the artificial notion that by giving a legacy to legitimate children the father was considered as merely paying a debt of nature: See, however, *In re Lawes*, L. R. 20 Ch. Div. 81.

**D. Mother—Housekeeper.**—There being no obligation on the mother of a child to provide for it, as in the case of a father, she cannot be said to stand in loco parentis: *Bennett v. Bennett*, L. R. 10 Ch. Div. 474. Nor is a legacy to the testator's housekeeper adeemed by a subsequent gift of a house there being no evidence on the part of the testator to put himself in loco parentis to the legatee: *Appeal of Sprenkle* (Pa.), 15 Atl. 773.

**E. Test.**—The test is whether the circumstances taken in the aggregate amount to a moral certainty that the testator considered himself in the place of the child's father, and as meaning to discharge those natural obligations which it was the duty of the parent to perform: *Gill's Estate*, 1 Pars. Eq. Cas. (Pa.) 139.

The fact that the child's father is alive is not conclusive against the assumption by a stranger of the place of the parent, but it affords some inference against it: *Powys v. Mansfield*, 3 Mylne & C. 359. On the question as to whether he intended to assume that relation parol evidence is admissible, and the declarations of the testator allowed for that purpose: *Gill's Estate*, 1 Pars. Eq. Cas. (Pa.) 139; *Powys v. Mansfield*, 3 Mylne & C. 359; *Booker v. Allen*, 2 Russ. & M. 270.

The relation of parent must exist at the date of the will, or it will not be presumed as a portion: *Watson v. Watson*, 33 Beav. 574.

### 3. Bequest of Residue.

**A. The Early Rule.**—The early rule was that a bequest of the residue, or part of the residue, of an estate was not adeemed by a subsequent advancement, the reason being that such bequest was uncertain; or, as stated in *Freemantle v. Banks*, 5 Ves. Jr. 79, the idea of a portion is ex vi termini a definite sum; therefore a residuary bequest cannot be a portion, and if there is no portion there is no

ademption by advancement. See, in accord, *Davis v. Whittaker*, 38 Ark. 435; *Clendening v. Clymer*, 17 Ind. 155; *Grigsby v. Wilkinson*, 9 Bush (Ky.), 91; *Hays v. Hibbard*, 3 Redf. (N. Y.) 28; *Farnham v. Phillips*, 2 Atk. 215; *Smith v. Strong*, 4 Bro. C. C. 493.

**B. The Modern Rule.**—Later cases have refused to adopt this view, however. In *Matter of Turfler's Estate*, 1 Misc. Rep. (N. Y.) 58, 23 N. Y. Supp. 135, the present view is stated as follows: "It is claimed that this principle of ademption is not applicable to a bequest of residue, but while the earlier authorities seem to have so indicated, yet the later ones hold the contrary. In *Montefiore v. Guedalla*, 1 De Gex, F. & J. 93, Lord Chancellor Campbell writing the opinion, at page 99: "It has been said that there cannot be an ademption where a testamentary gift is of the residue of the testator's property. This position rests upon no principle, and if strictly acted upon would produce great injustice. The doctrine of ademption has been established for the purpose of carrying into effect the intention of fathers of families in providing for their children, and of preventing particular children from obtaining double portions, contrary to said intention. The only reason for the exception is that a residue is uncertain and may be worthless. . . . But if a testator, after directing his executor to pay debts, funeral expenses, and legacies, goes on to say: 'And whereas, I wish all the residue of my personal property to be equally divided among my three children, I direct that each of them receive one-third of the residue,' and afterward he advances five thousand pounds to a daughter on her marriage, or to a son to purchase a commission in the army, can there be any doubt that he meant this sum to be deducted from the one-third of the residue coming to the daughter of the son?" Speaking of the cases to the contrary, he said: "The whole of that class of cases has been swept away by *Thynne v. Glengall*, 2 H. L. Cas. 131. Upon the whole, [Lord Campbell still writing] I think the question whether a gift of residue does or does not operate as an ademption or satisfaction, must depend upon the intention": See, also, 2 *Williams on Executors*, 1442.

A daughter's share of the residue was held adeemed by advancements made upon her marriage in *Beckton v. Barton*, 27 Beav. 99; *Stevenson v. Masson*, L. R. 17 Eq. 78. And see *In re Vickers*, L. R. 37 Ch. Div. 525, in which case a bequest of the residue was held adeemed by advancements to sons in business.

In *Meinertzen v. Walters*, L. R. 7 Ch. 670, a testator directed his trustees to pay the income of one-half of the residue to his widow for life, and to divide the other half between his children in equal shares, as tenants in common. After the date of the will, the testator made advances to some of his children. It was held that such advances could only be brought into account for the benefit of the children among themselves, and that the widow was not en-

titled to have her income increased by having the advances brought into account in estimating the residue. In his opinion, Mellish, L. J., said: "If the rule is, that we are to carry out what the testator intends, it is clear that when he makes a gift in his lifetime, as in this case, he does not intend to take away from the residue which he has given to a stranger. It cannot possibly be disputed that if the testator had given to his widow a life interest in the whole of the residue, the fact of making a gift in his lifetime to a child, just as to anybody else, must have had the effect of diminishing that residue; and it certainly appears to me contrary to reason to hold that if, instead of having given his wife a life interest in the whole residue, he gives her a life interest in the half, and then makes presents to children, she is in that case to have a life interest in that which he meant the child to enjoy immediately."

**4. When Advancement to be Made.**—It is recognized as the law in all of the states and in England that a legacy is not adeemed by an advancement made prior to the execution of the will bestowing the legacy: *Chapman v. Allen*, 56 Conn. 152, 14 Atl. 780; *In re Lyon's Estate*, 70 Iowa, 375, 30 N. W. 642; *Jacques v. Swasey*, 153 Mass. 596, 27 N. E. 771; *Matter of Crawford*, 113 N. Y. 560, 21 N. E. 692; *Zeiter v. Zeiter*, 4 Watts (Pa.), 212, 28 Am. Dec. 698; *Taylor v. Cartwright*, L. R. 14 Eq. 167. It will, of course, operate as an ademption if the testator charges it in his will against the legatee: *Kreider v. Boyer*, 10 Watts (Pa.), 54; *Strother v. Mitchell*, 80 Va. 149; and in *Upton v. Prince*, Cas. t. Talb. 17, a father advanced some of his children with portions during his lifetime, and then made a will, in which he recited that he had advanced two of the children, but omitted to recite the third, whom he had also advanced, and left him a certain sum, and devised the residue equally among them; it was held that the money advanced to the third son should go in satisfaction of the legacy.

Where a grandfather made provision for the marriage of his grandson, which he did not fulfill to the letter, but made a larger and more beneficial one by will, the latter is a substitution for the former, and excludes the idea of a double portion: *Waters v. Howard*, 8 Gill, 262.

In *Robbins v. Swain* (Ind.), 32 N. E. 792, an advance was made by an aunt to one of her nieces, who gave her a receipt, prior to the execution of the will, acknowledging the sum as part of the bequest. It was held that this was an ademption pro tanto of the legacy, as the testatrix intended by her will to make her bounty to this and another niece equal, and although the receipt was not mentioned in the will.

**f. Devises of Real Estate.**—The doctrine of ademption has no application to devises of real estate, acting only upon personalty bequeathed by will: *Marshall v. Rench*, 3 Del. Ch. 239; *Weston v. John-*

son, 48 Ind. 1; Swails v. Swails, 98 Ind. 511; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Clark v. Jetton, 5 Sneed (Tenn.), 229. The reason for this is well expressed in Fisher v. Keithley, 142 Mo. 244, 64 Am. St. Rep. 560, 43 S. W. 650, in the following language: "A conveyance by the testator, during his lifetime, of the land previously devised, operates as a revocation of the devise. This results from necessity on account of a failure of the subject of the devise. It cannot be regarded either as ademption or as an exception to the statutory mode of revocation. In neither case is it intended by the courts to set aside the statute or to defeat its provisions. Real estate is known and transferred by its description, and in case specific land is devised, a subsequent conveyance of other land does not take the devised land out of the will, and cannot effect an ademption of the devise without violating the letter and spirit of the statute. The statute was supposed to subserve a salutary purpose, and should not be disregarded by the courts, even to carry out the intention of the testator, and to accomplish a more equitable division of his property among his children." See, also, Davys v. Boucher, 3 Younge & C. 397, which holds that to allow ademption in such cases would be virtually repealing that section of the statute of frauds relating to the revocation of wills of real estate.

An exceedingly strong case in this connection is Burnham v. Comfort, 108 N. Y. 535, 2 Am. St. Rep. 462, 15 N. E. 710. There a testator, by will, devised certain land to his daughter. After its execution, in consideration of a sum of money, she signed a written instrument which stated that the sum so received was in lieu of her share of her father's estate; and it was intended to be in satisfaction of the devise. The testator never altered his will, and died fifteen years after. It was held that the daughter was entitled to recover the land devised, the writing not working a revocation, which could only be done by alienation of the land by the testator, or by complying with the statute.

The Virginia court, however, has held a contrary doctrine, and in Hansbrough v. Hooe, 12 Leigh (Va.), 316, 37 Am. Dec. 659, a devise of land was considered adeemed by a gift of other land.

**g. Pro Tanto Ademption.**—In an old English case, Hartop v. Whitmore, 1 P. Wms. 681, it is laid down as the law that where, by will, a daughter is given five hundred pounds, and afterward on her marriage, the testator gives her three hundred pounds for her portion, this is a revocation of the bequest.

The law now is otherwise, and in such a case where ademption occurs, it is pro tanto only, and not absolute: New Albany Trust Co. v. Powell (Ind. App.), 64 N. E. 640; Brady v. Brady, 78 Md. 461, 28 Atl. 515; Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; Richardson v. Richardson, Dud. Eq. (S. C.) 184; Thellusson v. Woodford, 4 Madd. 420; Pym v. Lockyer. 5 Mylne & G. 29; Dawson v. Dawson, L. R. 4 Eq. 504; Nevin v. Drysdale, L. R. 4 Eq. 517.



So where land is conveyed or sold, which has been devised, this operates as a revocation only as to the portion transferred: *Carter v. Thomas*, 4 Me. 341; *Emery v. Union Soc.*, 79 Me. 334, 9 Atl. 891; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; *Webster v. Webster*, 105 Mass. 538. And where a testator undertakes to dispose of real and personal property, and subsequently conveys the real estate, this does not revoke the will as to the personalty, but only pro tanto, as to the amount actually alienated: *Warren v. Taylor*, 56 Iowa, 182, 9 N. W. 128.

#### **h. Presumptions and Evidence.**

**1. Burden of Proof.**—The doctrine of ademption by advanced portions proceeds entirely along the lines of the intention of the testator. In the case of his child, it is presumed to be in satisfaction of the legacy, and the burden is upon the child to show that such was not the testator's intention, and if this is done, no ademption occurs. So where a gift has been made to a stranger, although not presumed as a satisfaction, it may be shown to have been really so intended, but the burden is on the person asserting it: *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350.

**2. Parol Evidence Admissible.**—To repel this presumption, it is now well settled that parol evidence is admissible. "The object of such proof is not to change the will, or to give the language employed a meaning different from that which it ordinarily and appropriately has, but merely to show that the testator has not executed or satisfied some bequest contained in it, in whole or in part. The proof, in other words, does not alter, add to, or change the will, but is admitted to show with what intent the subsequent portion, gift, or advancement was made": *May v. May*, 28 Ala. 141. This is borne out by the following authorities: *Johnson v. Belden*, 20 Conn. 322; *Rogers v. French*, 19 Ga. 316; *Richardson v. Eveland*, 126 Ill. 37, 18 N. E. 308; *Timberlake v. Parish*, 5 Dana (Ky.), 345; *Matter of Townsend*, 5 Dem. (N. Y.) 147; *Degraaf v. Teerpenning*, 52 How. Pr. (N. Y.) 313; *Langdon v. Astor*, 16 N. Y. 9, 3 Duer, 477; *Gill's Estate*, 1 Pars. Eq. Cas. (Pa.) 139; *Biggleston v. Grubb*, 2 Atk. 48; *Shudal v. Jekyll*, 2 Atk. 516; *Kirk v. Eddowes*, 3 Hare, 509; *Ellison v. Cookson*, 1 Ves. Jr. 100.

If the presumption against double portions is attempted to be rebutted by parol, it may be supported by evidence of the same character: *Miner v. Atherton*, 35 Pa. St. 528; *Powys v. Mansfield*, 3 Mylne & C. 359. In such a case equity raises the presumption against double portions, and parol evidence is admitted merely to confirm the presumption already raised: *Sims v. Sims*, 10 N. J. Eq. 158.

In *Wallace v. Du Bois*, 65 Md. 153, 4 Atl. 402, parol evidence was held admissible where the money was advanced by a father under

such circumstances as not to raise the presumption of satisfaction, to show that such was really his intention.

**3. Strength of the Presumption.**—Advancements to children are presumed to be in satisfaction of legacies, and this presumption is not rebutted by slight circumstances: *Hinchcliffe v. Hinchcliffe*, 3 Ves. Jr. 516. So where there is a slight difference between the gift and the legacy as to the time of payment, it will not prevail against the presumption of satisfaction: *Barelay v. Wainwright*, 3 Ves. Jr. 462; *Hartopp v. Hartopp*, 17 Ves. Jr. 184. A contrary view is held in *Van Houten v. Post*, 32 N. J. Eq. 709, 33 N. J. Eq. 344, holding that the presumption is slight, and citing in support *Rosewell v. Bennet*, 3 Atk. 77; *Kirk v. Eddowes*, 3 Hare, 509.

As to the strength of the presumption, the court in *May v. May*, 28 Ala. 141, said: "Had the amounts advanced been inconsiderable, the presumption that the provisions were cumulative and intended so to operate, would have been much less stringent. But when the provision amounts to as much, or more, or approximates very nearly the amount to which the child would be entitled under an equal distribution as provided for in the will, the presumption becomes very strong that the father was executing his will, in part at least, and under such circumstances, the law requires very clear and satisfactory proof that it was intended by the father to give the children thus advanced double portions." As to the occasion of making the gift, and its influence upon the presumption, see *Robinson v. Whitley*, 9 Ves. Jr. 577.

**4. Intention of Testator.**—The intention of the testator being the essence of ademption by advancement, the assent of the legatee is not necessary: *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. 414. In Georgia a legacy may be adeemed by delivery of property to the legatee during the testator's lifetime, but the delivery must be of such a character as to show it was the testator's intention to part at that time irrevocably with dominion over the property; and ademption is a question of fact for the jury: *Clayton v. Akin*, 38 Ga. 320, 95 Am. Dec. 393.

A Kentucky statute provides that a provision for or advancement to, any person, whether child or stranger, shall be deemed a satisfaction in whole or in part of a devise or bequest contained in the will, in all cases in which it shall appear from parol or other evidence to have been so intended. Under this statute, one claiming an advancement to be in satisfaction of a legacy must aver that such was the intention of the testator: *Swinebroad v. Bright*, 23 Ky. Law Rep. 55, 62 S. W. 484.

**5. Testator's Books of Account.**—The books of account of a testator, wherein certain sums are directed to be taken from a child's portion, as bequeathed by will, are not evidence per se. The fact of advancement must be proved by evidence aliunde, which

taken in connection with the books, would prove the fact: *Benjamin v. Dimmick* 4 Redf. (N. Y.) 7; *Lawrence v. Lindsay*, 68 N. Y. 108; *Marsh v. Brown*, 18 Hun, 319.

### III. Specific Legacies.

#### a. Testator's Intention.

**1. Of no Importance.**—The class of legacies thus far discussed are those known as general or pecuniary. We now come to another class, as to the ademption of which some conflict and confusion has arisen—specific legacies, which are, as the name implies, bequests of certain, definite objects: *Hood v. Haden*, 82 Va. 588.

One line of cases holds that the ademption of a specific legacy does not depend upon the intention of the testator, the sole test being, Does the thing bequeathed remain in specie at the time of the testator's death? If it does not, it is adeemed: *Richards v. Humphreys*, 15 Pick. (Mass.) 133; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Hoke v. Hermann* 21 Pa. St. 301; *Stanley v. Potter*, 2 Cox, 180; *Humphreys v. Humphreys*, 2 Cox. 184.

**2. The Doctrine Criticised.**—The doctrine of these cases is repudiated and criticised in *Beall v. Blake*, 16 Ga. 119, in the following strong language: "A testator's intention, if that is not illegal, is the law to his will. To this rule there is no exception of which I am aware. And yet I am aware, that in 1786, Lord Thurlow, as Chancellor, in the case of *Ashburner v. Macguire*, commenced the making of an exception to it, and that in the course of a short time afterward in the cases of *Badrick v. Stevens*, 3 Bro. C. C., 431, *Stanley v. Potter*, 2 Cox, 180, and *Humphries v. Humphries*, 2 Cox, 184, he completed the work, as far as in him it lay to complete it.

"In the last of these cases, he makes the announcement, 'that, he was satisfied, from the consideration he had given to the cases on a former occasion, that the only rule to be adhered to, was to ascertain whether the subject of the specific bequest remained in specie, at the death of the testator; and if it did not, that then there must be an end of the bequest; that the idea of discussing what might be the particular motives and intentions of the testator, in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion': *Roper on Legacies*, 244.

"Now a thing cannot be said to 'remain in specie' a testator's, at the time of his death, if before that time he has sold it or otherwise parted with it, or if the thing has perished, or if it was never his, but was always another's, although he thought it to be his when he bequeathed it. Lord Thurlow's announcement comes, therefore, to this: That if a testator, after making his will, has sold the thing which constitutes a specific bequest, or has otherwise parted with it; or if the thing has itself perished; or if it was never his to bequeath, but was always another's, although he thought it his—in

any of these cases, the specific bequest is adeemed—is so completely adeemed, that if the case be that the thing given has perished, there can be no replacement of it by an equivalent, in money or other thing; or if the case be that the thing bequeathed has ceased to belong, or has never belonged to the testator, there can be made, by the executor with the true owner, no arrangement by which to render the thing subject to the bequest, no odds how manifest it may be in the will that the testator intended such replacement, or arrangement, whichever it might be, that the case should require. . . . .

“The upshot of this innovation of Lord Thurlow was a state of evil so intolerable that parliament had, at length, to interpose with a statute for its suppression. This parliament did, by Statute 1 Victoria, chapter 26, section 23, which enacts, ‘that no conveyance, or other act, made or done subsequently to the execution of a will of, or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked, as aforesaid shall prevent the operation of the will, with respect to such estate, or interest in such real or personal estate, as the testator shall have power to dispose of by will, at the time of his death.’ And section 24, which enacts ‘that every will shall be construed with reference to the real estate, and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear in the will.’

“The effect of these enactments must be, in a great measure, if not altogether, to suppress Lord Thurlow’s innovation, and to make the old rule its pristine breadth—to make it a rule without exception—the old rule, that the testator’s intention gives law to his will.”

#### b. Bequest of Debt.

1. **Adeemed by Payment.**—The bequest of a debt is a specific legacy, and payment to the testator during his lifetime works an ademption thereof: *Succession of Batchelor*, 48 La. Ann. 278, 19 South. 283; *Badrick v. Stevens*, 3 Bro. C. C. 431; *Fryer v. Morris*, 9 Ves. Jr. 360; *Pawlet’s Case*, Ld. Raym. 335; *Manton v. Tabois*, L. R. 30 Ch. Div. 92. So where a husband gives and bequeaths to his wife “all moneys and interest that may be recovered of and from Dr. K., for the purchase of the Penrose estate,” and he receives the money therefor in his lifetime, the specific debt is adeemed: *Gilbreath v. Alban*, 10 Ohio, 64. So a legacy given to satisfy a debt due a legatee from a third person is in the nature of a specific legacy, and payment by the testator in his lifetime works an ademption: *Tanton v. Keller*, 167 Ill. 129, 47 N. E. 376, affirming 61 Ill. App. 625. See, also, *Taylor v. Tolen*, 38 N. J. Eq. 91.

2. **Distinction Between Voluntary and Compulsory Payment.**—A distinction was formerly made in the case of a bequest of a debt,



between when it was voluntarily paid, and when paid by compulsion. In the former case it was held not to work an ademption, as the act was not that of the testator, and he could not help receiving the amount; while in the latter case the act was his own, and showed an intention on his part to treat the legacy as at an end: *Stout v. Hart*, 7 N. J. L. 414; *Lawson v. Stitch*, 1 Atk. 507; *Crockat v. Crockat*, 2 P. Wms. 164; *Rider v. Wager*, 2 P. Wms. 328; *Drinkwater v. Falconer*, 2 Ves. 623, the distinction being borrowed from the civil law: *Birch v. Baker*, Mosely, 373.

This distinction is at present not recognized, and ademption is held to have taken place when the debt was paid, regardless of whether done voluntarily or under compulsion: *Wyckoff v. Perrine*, 37 N. J. Eq. 118; *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, p. 246.

**3. As Advancement.**—A debt may be made the subject of an advancement the same as a gift of money. So where by will a testator, after reciting that his son owed him a certain sum, due on notes, released him from the payment of interest up to the time of his death. Some years later he made a codicil, not referring to said release. At the date of the will the son owed the testator fourteen hundred pounds, and between the date of its execution and that of the codicil that sum was paid off, and a subsequent advance of twelve hundred pounds was made to the son, which was owing at the testator's death. It was held that the release of interest was equivalent to a specific legacy of the interest on the debt due when the will was made, and that it had been adeemed, not extending beyond the date of the will: *Sidney v. Sidney*, L. R. 17 Eq. 65. See, also, *Davis v. Close*, 104 Iowa, 261, 73 N. W. 600.

The declarations of a parent, made after debts have been contracted, of an intention to treat them as advancement, are not admissible, such declarations not being communicated to the child, nor accompanied by an act sufficient to obliterate the obligations as debts: *Yundt's Appeal*, 13 Pa. St. 575, 53 Am. Dec. 496.

**4. Proceeds of Debt.**—Where the proceeds of a debt, and not the debt itself, given by will, are paid during the life of the testator, no ademption occurs. In *Coleman v. Coleman*, 2 Ves. Jr. 639, the testator gave the interest of a certain bill of exchange to his wife for life, and directed that after her death the bill should be sold and the money divided among certain persons; the bill was paid before the testator's death, and was held not adeemed thereby. So where "an amount of money" that might accrue from a certain claim was bequeathed, and subsequently paid, under order of court, the money being invested in consols, which were treated as subjects of the legacy, ademption was held not to have occurred, the court saying: "The strict construction of the testator's language makes it not a gift of the debt qua debt, but of the sum of money produced when the debt was recovered and ceased to exist as a

debt. This goes to show that the testator contemplated the recovery of the debt in his own lifetime, when the subject of the gift could not be the debt itself, but the amount recovered in respect of it": *Clark v. Browne*, 2 Smale & G. 524.

Where a legacy of two thousand pounds was devised, which was made up of debts due the testator and mentioned in a schedule annexed to the will, but in fact they amounted only to seventeen hundred pounds, it was held that the devisee was entitled to the full two thousand pounds: *Petteward v. Petteward*, Rep. T. Finch, 152.

### c. Stocks, Shares and Bonds.

**1. Ademption by Sale.**—Stocks and bonds are the common subjects of bequests, and difficulty has arisen in the application of the doctrine to them. The sale of stock specifically bequeathed, the same as the sale of any chattel, works an ademption, and the difficulty lies in determining whether the legacy is specific. Where a testator leaves the income of a certain number of shares, which is the exact number he owns at the time, and subsequently sells them, the legacy is specific and adeemed: *White v. Winchester*, 6 Pick. (Mass.) 48. So where "my one thousand pounds East India stock" was left by will, it was held specific and adeemed by sale thereof: *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, p. 246. See, also, *Douglass v. Douglass*, 13 App. D. C. 21; *Harvard Unitarian Soc. v. Tufts*, 151 Mass. 76, 23 N. E. 1006; *Blackstone v. Blackstone*, 3 Watts (Pa.), 335, 27 Am. Dec. 359.

In *Hosea v. Skinner*, 32 Misc. Rep. 653, 67 N. Y. Supp. 527, the testator left shares or the proceeds thereof "when realized as same would have been to me." Before his death they were sold and the proceeds invested in shares of another company. It was held that the legacy was specific and adeemed, and the legatee not entitled to the other shares. In *Matter of Andrew's Estate*, 25 Misc. Rep. 72, 54 N. Y. Supp. 708, shares or "the proceeds thereof when realized" were bequeathed, and sale of them by the testator was held no ademption, and the legatee entitled to the proceeds.

The sale of stock specifically bequeathed, then, working an ademption, stock subsequently purchased by the testator does not pass to the specific legatee: *Harrison v. Jackson*, L. R. 7 Ch. Div. 339; *Macdonald v. Irvine*, L. R. 8 Ch. Div. 101. In *Pattison v. Pattison*, 1 Mylne & K. 12, a testator bequeathed certain annuities, sold them and bought others, different only in that they terminated a quarter of a year sooner. The court held that the specific thing bequeathed not existing at his death, it was adeemed.

### 2. Ademption by Exchange and Conversion.

**A. Voluntary.**—The same rule applies where it is exchanged for, or converted into, other security. So where a testator bequeathed de-

bentures in a certain company, and subsequently converted them into debenture stock of the same company, the latter did not pass by will: *In re Lane*, L. R. 14 Ch. Div. 856.

Slight and immaterial changes in form of the security do not work an ademption: *In re Frahm's Estate* (Iowa), 94 N. W. 444; as where the stock is vested in trustees for the use of a person, who afterward takes it into her own name: *Dingwell v. Askew*, 1 Cox, 427. Where stock in an insurance company was left, which company lost its capital stock in the course of business, after the making of the will; and on its stock being filled again, the testator paid up part only of his shares and retained them till his death, the legacy was held not to be adeemed as to such part of the stock: *Havens v. Havens*, 1 Sand. Ch. (N. Y.) 324.

In *In re Peirce*, 25 R. I. 34, 54 Atl. 588, a testatrix bequeathed shares of stock in a bank, which subsequently during her lifetime consolidated with other banks, the new concern taking over the liabilities and assets of the several banks without a formal liquidation, and their stockholders were allowed to exchange their shares for shares in the consolidated bank. No ademption was held to have occurred, although the testatrix had to make a small additional payment: See, also, *In re Pitkington's Trusts*, 6 N. R. 246.

**B. By Act of Law.**—An exception to the rule exists where the alteration in the stock is brought about by an act of law. So where stock bequeathed is subsequently turned into annuities by act of parliament, it is not adeemed: *Bronsdon v. Winter*, 9 Amb. 56; nor does the conversion of a state bank into a national bank, under an act of Congress, adeem the stock: *Maynard v. Mechanics' Nat. Bank*, 1 Brewst. (Pa.) 483. See in this connection *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456, and *Partridge v. Partridge*, Cas. t. Talb. 226.

In *Oakes v. Oakes*, 9 Hare, 666, a bequest was made of all the testator's Great Western Railway shares, and all other railway shares of which he might be possessed at the time of his death; this was held to pass the Great Western Railway shares which he had at the date of his will, and which were afterward converted into consolidated stock, by resolution of the company, made under authority of an act of parliament; but not to pass the consolidated stock purchased by the testator after the date of the will, share and stock being two different things.

**C. Gradual Acquisition.**—When the stock bequeathed is sold, the legacy is adeemed, even though similar shares be in the testator's possession at the time of his death. So where, being possessed of one thousand pounds guaranteed stock in the N. B. railway, a testator left to a legatee "my one thousand N. B. preference shares," and afterward sold them, and died possessed of shares in the N. B. railway, acquired by several successive purchases, exceeding the amount bequeathed, it was held to be adeemed: *In re Gibson*, L. R.

2 Eq. 669. The court there said: "In this case the testator, at the time of his death, had not this specific stock in any shape. He had parted with it, and acquired by subsequent purchase a much larger number of shares. These subsequent purchases were not in any shape a replacing of the original fund, and there is nothing to lead the court to suppose that, having once adeemed the specific bequest, the testator has replaced the identical thing. He has distinctly referred to one thing in his will, which was no longer in existence at the time of his death. That thing, and that only, can be considered as the subject of the bequest."

In *Partridge v. Partridge*, Cas. t. Talb. 226, one devised to another one thousand pounds capital South Sea stock; at the time of making his will he had eighteen hundred pounds such stock, which afterward, by sale, he reduced to two hundred pounds, subsequently increasing it to sixteen hundred pounds, which amount he had when he died. In his opinion the lord chancellor said: "All cases of ademption of legacies arise from a supposed alteration of the intention of the testator; and if the selling out of the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again. . . . It would be very hard in the case at bar to consider the selling as an ademption, because he might sell out for some particular purpose, and as soon as that purpose was answered he might buy in again."

**D. Unauthorized Investment.**—The investment of proceeds unauthorized by the testator has been held not to work an ademption: *Busan v. Brandon*, 8 Sim. 171. The facts in that case were as follows: A resident of Jamaica bequeathed to a legatee two thousand pounds, part of seven thousand pounds in the hands of his agents in England. He afterward went to Philadelphia, where he died. A week before his death he wrote to his agent in Jamaica, requesting him to order his agents in England to invest all of the above-mentioned sum in any stock most beneficial to his estate. The agent wrote accordingly, but before the arrival of his letter in England, the agents there had voluntarily invested the whole of the testator's moneys in their hands in certain securities. No ademption resulted, the court saying: "A mere unexecuted intention to change the state of a fund, which the testator might have revoked, and which, in fact, was never carried into execution, cannot, in any sense, be considered as an ademption."

**E. Under Orders in Lunacy.**—A testator, after bequeathing specific stock, was found a lunatic, and under an order in lunacy the stock was sold and the proceeds invested in consols. The court held the first stock adeemed, and the consols went into the residue of the estate: *In re Freer*, L. R. 22 Ch. Div. 622; *Jones v. Green*, L. R. 5 Eq. 555. In *Jenkins v. Jones*, L. R. 2 Eq. 323, however, after the



testator had become insane, the specific legatee with the concurrence of the executrix, put the money derived from the sale of the shares in a bank, in the names of themselves and a third person, where it remained till the testator's death; and it was held not to be adeemed.

**d. Mortgages.**—Like a debt, a mortgage may be specifically bequeathed, and the same rule in regard to its being in esse as a mortgage applies. In *Abernethy v. Catlin*, 2 Dem. (N. Y.) 341, a testator gave his executors, by will, a certain bond and mortgage for seven thousand dollars, the amount of principal due, held against a certain person, to convert into money on a fixed occasion, and divided the proceeds. The principal had originally been ten thousand dollars, the unpaid balance being due at the execution of the will. That balance was afterward paid the testator, who deposited it in a bank, where it remained. This was held a specific legacy, and adeemed by payment. Two important New York cases were discussed, as follows: “In *Gardner v. Printup*, 2 Barb. 83, the supreme court of this state had under consideration a case closely resembling the present. A testator bequeathed ‘the proceeds of a bond and mortgage,’ which he described. In his lifetime he commenced proceedings for the collection of the amount due on the bond. This led to a sale of the mortgaged premises. The testator was paid a certain sum in cash, and took from the purchaser a bond which he indorsed as payment on the original mortgage. It was held that, under these circumstances, the legacy was extinguished.

“The question of ademption came again before the supreme court in the case of *Beck v. McGillis*, 9 Barb. 35. A testator had executed a will bequeathing a certain mortgage which he had afterward foreclosed. He had taken from the purchaser a new mortgage upon the same premises. It was held that the foreclosure had destroyed the legacy, and that, too, in spite of the fact that, after the decease of the testator, there was found among his papers a memorandum in his own handwriting declaring that he intended the new mortgage to take the place of the old, and to pass under his will as the other would have done if it had remained unextinguished at his death.”

In *Gardner v. Hatton*, 6 Sim. 93, seven thousand pounds secured on mortgage was bequeathed; after the will was made, that sum was received by the testator, and six thousand pounds of it immediately invested on another mortgage, the other one thousand pounds being deposited in a bank. The legacy was held to be specific and adeemed. Where a will directed that the proceeds of a certain mortgage owned by the testatrix should be used to pay an existing mortgage against the estate, but which was paid to her before her death, and the proceeds invested in certain railroad bonds, it was held that, as the bonds were traceable to the immediate proceeds of the mort-

gages, they were the proceeds thereof within the meaning of the will: *Hopkins v. Gouraud*, 23 N. Y. Supp. 189.

Where a will directed the amount of a certain bond to be collected after the death of the decedent's wife, and divided among certain legatees, and afterward the testator took from the obligors an assignment of another bond and mortgage of equal amount, in place of the first bond, and it was not paid at his death, the court held the legacies general and not adeemed: *Doughty v. Stillwell*, 1 Bradf. (N. Y.) 300.

For a case in which the mortgages bequeathed were held not to be adeemed by the mere transfer to a different name, they remaining in specie at the testatrix's death, see *In re Tillinghast*, 23 R. I. 121, 49 Atl. 634. See in addition "Demonstrative Legacies," VIII, and "Bequests of Proceeds," V, herein.

**e. Insurance Policies.**—Policies of life insurance rest on the same ground as instruments bequeathed, and where paid during the testator's lifetime do not pass: *Barker v. Rayner*, 5 Madd. 208, on appeal, 2 Russ. 124. Where specific chattels bequeathed were insured and lost at sea, the legatee was held to have no claim upon the insurance money, being different from what was by will left: *Durrant v. Friend*, 5 De Gex & S. 343.

**f. Articles of Partnership.**—A partner by will gave part of the profits reserved to him to his partner. Afterward, at the expiration of the partnership, he renewed it with the same men, giving them a greater interest than they had under the former articles. It was held that the renewal of the partnership did not work an ademption: *Blackwell v. Child*, Amb. 260.

#### IV. Modes of Ademption.

**a. Acquisition.**—Ademption in the case of specific legacies arises generally in one of two modes, alienation and acquisition.

Acquisition occurs where the thing bequeathed is not the testator's when the will is made, but subsequently becomes his; and has been more fully discussed under the preceding subdivision of debts, etc., in detail. Ademption by acquisition applies only to specific legacies: *In re Bradley's Will*, 73 Vt. 253, 50 Atl. 1072.

##### **b. Alienation.**

**1. Of Personality.**—Alienation is, perhaps, the most common cause of ademption. As where a slave is bequeathed and is sold during the lifetime of the testator, ademption occurs, there being nothing for the bequest to act upon: *Godard v. Wagner*, 2 Strob. Eq. (S. C.) 1. It was held in *Blakemore's Succession*, 43 La. Ann. 845, 9 South. 496, that the sale of property bequeathed does not revoke a legacy of it, when clearly proved that such was not the intent of the testator, as in the case of a simulated transfer acknowledged by the

vendee, the property returning to the testator, and being in esse at his death.

The strict common-law rule as to the alienation of the subject of a specific legacy was changed in Kentucky by statute, which enacts that: "The conversion, in whole or in part, of money or property, or the proceeds of property devised to one of the testator's heirs into other property or thing; with or without the assent of the testator, shall not be an ademption of the legacy or devise unless the testator so intended; but the devisee shall have and receive the value of such devise unless a contrary intention on the part of the testator appear from the will, or by parol or other evidence: *Schaefer v. Voght's Trustee*, 23 Ky. Law Rep. 2291, 67 S. W. 54; *Miller v. Malone* (principal case), 109 Ky. 133, 58 S. W. 708. This statute applies only where the devisee is an heir of the testator: *Franck v. Franck*, 24 Ky. Law Rep. 1790, 72 S. W. 275. See *Patton v. Patton*, 2 Jones Eq. (N. C.) 494, for a case in which the property was sold, without the knowledge of the testator, and the legacy was held not adeemed.

**2. Of Real Property.**—If the real property devised is sold, the money received cannot be substituted for the land, it becoming personalty, and the devisee has no claim upon the fund: *Philson v. Moore*, 23 Hun (N. Y.), 152. So a conveyance in fee simple of a lot is a revocation as to it, and the rent reserved to the grantor therefrom does not pass to the devisee: *Skerrett v. Burd*, 1 Whart. (Pa.) 246. And where a testator devised all his real estate to his wife, for life, to be sold after her death and the proceeds divided among his nephews and nieces, and he subsequently sold a portion of the land, taking a mortgage for part of the purchase money, this operated as a revocation of the devise, and the nephews and nieces took no interest in the purchase money mortgage, that going to the residuary legatee: *McNaughton v. McNaughton*, 34 N. Y. 201.

Generally, where an option is given and not exercised till after the death of the testator, the proceeds are treated as personalty: *Lawes v. Bennett*, 1 Cox, 167, 1 R. P. 10. Where the intention, however, is otherwise manifested, a different rule prevails: *In re Pyle*, 13 Rep. 396. In that case the decedent devised real estate, subsequently made a codicil confirming the will, and on the same day executed a lease of the realty, giving the lessee an option to purchase, which was exercised after the testator's death. This was held a sufficient indication of intention that the money should go the same way as the land, and that the specific legatee was entitled to it.

Where the property was sold, and the will provided for sale thereof, and distribution of the proceeds, and no ademption occurred, see *Connecticut Trust etc. Co. v. Chase* (Conn.), 55 Atl. 171.

Where the real estate is sold under condemnation proceedings, the proceeds thereof become personal property, the same as in the case

of a voluntary sale, and the devisee is not entitled thereto: *Ametrano v. Downs*, 170 N. Y. 388, 88 Am. St. Rep. 671, 63 N. E. 340, affirming 62 App. Div. 405, 70 N. Y. S. 833.

As to the appointment of a power working an ademption see *Gale v. Gale*, 21 Beav. 349; *In re Dowsett* (1901), 1 Ch. 398, 70 L. J. Ch. 149.

## V. Bequest of Proceeds.

Where the proceeds of a bond and mortgage are specifically given, it is a specific legacy; but not where a certain sum, to be paid out of the proceeds of a bond and mortgage, is given. So if the legacy is specific, the proceeds must exist in some form at the testator's death, and when any part of them has become used in the payment of debts or otherwise, so as to have lost their separate identity, ademption pro tanto occurs: *Gardner v. Printup*, 2 Barb. (N. Y.) 83.

In *Nooe v. Vannoy*, 59 N. C. (6 Jones Eq.) 185, the court said: "As the proceeds of the sale of the property are given, it follows that if such a part thereof as is specified, can be traced out and identified, at the time of the death of the testator, the legacy will take effect, and there will be no ademption, or only a partial one. The distinction between the gift of the property itself and a gift of the value of the property, or the proceeds of the sale of property is well settled: *Pulsford v. Hunter*, 3 Bro. C. C. 416; 1 Roper on Legacies, 246, where it is said: 'The last class of cases to be noticed as not falling within the general rule of ademptions is where the terms of the bequest are so comprehensive as to include within their compass the fund specifically bequeathed, although it has undergone considerable alteration.' He illustrates the exception by supposing the value of certain notes and cash in the hands of B., to be given to C., and afterward the testator changes the notes and cash, by an investment, into exchequer bills, bonds or mortgages, which are placed in the hands of B., the exchequer bills, bonds or mortgages will pass, because they answer the specification of the fund in the will." See the distinction made between this case and *Starbuck v. Starbuck*, 93 N. C. 183, where the money was given and subsequently reinvested.

## VI. Change in Subject of the Bequest.

a. **As to Form of Security.**—An essential change in the thing specifically bequeathed works an ademption, and it therefore becomes necessary to determine what is an essential change.

Where notes, secured by mortgage, were bequeathed, which notes the testator surrendered, and took a reconveyance of the property for which they were given; and afterward sold the same property to another and took notes for it that were unpaid when he died, the legacy was held adeemed on account of the change: *Tolman v. Tolman*, 85 Me. 317, 27 Atl. 184. But where a testator, after bequeath-



ing by will a certain claim against his debtor, exchanges with the latter the original evidence of his debt for his bond, the legacy is not revoked by implication under the Louisiana statute, the only modification being in the form of the evidence, the obligation remaining: *Irwin's Succession*, 33 La. Ann. 63. So where notes bequeathed were signed by two persons, one of whom the testator, before his death, released, and took new notes for the debt from the other, signed, secured by mortgage, no ademption resulted: *Ford v. Ford*, 23 N. H. 212.

**b. As to Deposit in Bank.**—In *Prendergast v. Walsh*, 58 N. J. Eq. 149, 42 Atl. 1049, a testatrix by will gave her money in certain banks to her sisters; before her death she drew it out and deposited it in another, where it remained till her decease. Although a specific legacy, the court held it not to have been adeemed, saying: "It is undoubtedly true that a general deposit in a bank creates a debt from the bank to the depositor. The bank is not bound to preserve the money in specie, and it can be paid by the delivery of any money of equal amount. It is also true that a testamentary gift of a debt due to the testator is adeemed, if the debt is paid to the testator during his life. But it seems to me that, while such a deposit creates a debt, yet the gift of the amount of such deposit, as money or cash, differs from the gifts of an ordinary debt. It will pass by a gift of all the testator's ready money or cash. Sir Lancelot Shadwell, in the case of *Parker v. Marchant*, 1 Younge & C. Ch. 290-307, affirmed by Lord Chancellor Lyndhurst on appeal (1 Phill. Ch. 356), said: "Undoubtedly, an ordinary balance in the banker's hands is, in a sense, a debt due from him. Certainly, he may be sued for the debt. But it may be equally true that, in a sense, it is ready money. . . . The term 'debt,' however correct, is not colloquially or familiarly applied to the balance at a banking-house. No man talks of his banker being in debt to him. Men, speaking of such a subject, say that they have so much in their banker's hands. A mode of expression indicating virtual possession, rather than a right to which the law applies the term 'chose in action.' . . . In the present case the intention of the testatrix was not to give a mere thing in action. What she gave was the money in the banks—using the words in their popular sense. It is true that the money did not exist in specie, and would not again be delivered to her or her personal representatives in specie; yet, having put money there, which was still there as money, liable to be drawn as money, so she designated it as money. The thing she bequeathed she drew from the bank. It remained the identical thing bequeathed until disposed of in some way by her. . . . If the money remained practically the same money, then the removal of it from the place of its deposit did not amount to an ademption. The place of deposit was merely used as descriptive of the thing bequeathed." But see *Bell's Estate*, 8 Pa. Co. Ct. Rep. 454.

**c. As to Place or Locality.**—Some confusion has arisen among the authorities as to the effect of removing goods bequeathed as at a particular place. Where the place is merely descriptive, removal to another location is immaterial: *In re Tillinghast*, 23 R. I. 121, 49 Atl. 634; *Cunningham v. Ross*, 2 Cas. t. Lee, 272. The difficulty arises in determining whether the place, in each particular instance, is descriptive. In *Norris v. Norris*, 2 Coll. 719, 10 Jur. 629, there was a bequest of furniture in a certain house; subsequently the testator moved, took that furniture with him, and bought more. It was held that the bequest was not adeemed, being a general gift. So where a testator gave all his plate and linen in his house at S. to his wife, he having but one set of plate and linen, which was usually removed with the family from house to house, and at the time of his death it happened to be at B., the country house, it was held to pass to his wife: *Land v. Devaynes*, 4 Bro. C. C. 537.

In *Houlding v. Cross*, 1 Jur., N. S., 250, a testator bequeathed all the furniture which should be in a certain house at his death, in which he lived when the will was made; subsequently he moved, taking the furniture with him, and it was held to be adeemed: See to the same effect *Blagrove v. Coore*, 27 Beav. 138; *Green v. Symonds*, 1 Bro. C. C. 129, note; *Colleton v. Garth*, 6 Sim. 19; *Heseltine v. Heseltine*, 3 Madd. 276. In *Shaftsbury v. Shaftsbury*, 2 Vern. 747, after the bequest of the goods in a certain house, the steward of the testator, in the latter's absence, removed them to another house, on account of the expiration of the lease. It was considered an ademption, the testator having approved the move; but, if it had been fraudulently done, to defeat the legacy, or by tortious act with the testator's privity, the legacy would have passed. See, generally, *Domville v. Taylor*, 32 Beav. 604.

The removal of goods for a necessary purpose is not an ademption of a specific legacy: *Moore v. Moore*, 1 Bro. C. C. 127; as where removed from a ship if likely to founder, or a burning house: *Chapman v. Hart*, 1 Ves. 271, in which case a distinction is made between a legacy of goods on board a ship and in a house.

If the removal be temporary, the goods pass, as the intent is to return them, but not if taken permanently: *Spencer v. Spencer*, 21 Beav. 548. Intention, however, alone is not enough. In *Beaufort v. Dundonald*, 2 Vern. 739, one devised furniture in his house at D. and ordered goods to be carried from London thereto, making arrangements with carriers for that purpose. Before the goods were removed he died, and they were held not to pass by will, the mere intention to remove them not being sufficient.

Where a testator devised goods in a certain house at his death, and the tenant in possession thereof refused to allow him to place certain goods there, he wishing to do so, and in consequence of such refusal he stored them in farm buildings belonging to him, where they were at his death, there was no ademption: *Rawlinson v. Rawlinson*, L. R. 3 Ch. Div. 302.

### VII. Renewal of Leases.

The renewal of a lease devised works an ademption, for it is the old lease alone which is given, and that is gone: *Updike v. Thornton*, 100 Ill. 406; *Colegrave v. Manby*, 6 Madd. 72; *Home v. Medcraft*, 1 Bro. C. C. 261; *Abney v. Miller*, 2 Atk. 593. It is, however, a question of intention, and if the testator so desires he may dispose of a future interest in a chattel real: *Slatter v. Noton*, 16 Ves. Jr. 197; *Colegrave v. Manby*, 6 Madd. 72; *Carte v. Carte*, 3 Atk. 174. In *Digby v. Legard*, Dick. 500, the renewal of leases for lives was held a revocation as to them, but not as to leases for years, they being personalty. In *Porter v. Smith*, 16 Sim. 251, an ademption was held to be worked by the testator taking an assignment of the original lease bequeathed: See, also, *Rudstone v. Anderson*, 2 Ves. 418.

Where there was a general bequest of "all my leasehold estates," and the testator afterward surrendered and took a new lease, a revocation resulted: *James v. Dean*, 11 Ves. Jr. 383; but the court there held it depended upon the context of the whole will, whether the general doctrine should be applied; and in *Stirling v. Lydiard*, 3 Atk. 199, a bequest of "all and singular my leasehold estates" was held to be a general legacy, and the subsequent renewal of a lease passed.

### VIII. Demonstrative Legacies.

While a specific legacy is subject to ademption by failure of the thing bequeathed to be in esse at the time of the testator's death, neither general nor demonstrative legacies are so subject thereto. It therefore becomes of the highest importance to distinguish between these kinds of bequests. "A demonstrative legacy is a legacy of quantity, with a particular fund pointed out for its satisfaction, and it is so far general and differs so much from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet is so far specific that it is not liable to abate with general legacies upon a deficiency of assets: 2 Lomax on Executors, 70; 2 Williams on Executors, 1252; 2 Redfield on Wills, 137; *Corbin v. Mills*, 19 Gratt. (Va.) 438; 3 Pomeroy's Equity Jurisprudence, sec. 1133"; *Morris v. Garland*, 78 Va. 215. And see *Roquet v. Eldridge*, 118 Ind. 147, 20 N. E. 733. So where a testator bequeathed to his daughter a certain sum to be paid out of the profits of certain real estate, it was held a demonstrative legacy, and a subsequent disposition of that estate did not extinguish the legacy, which was then payable out of the general assets: *Welch's Appeal*, 28 Pa. St. 363. And a legacy to be paid out of the testator's life insurance is payable out of the general assets of the estate if the insurance is not collected, being demonstrative: *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576. But where the legacy is so

connected with the fund out of which it is payable that the legacy and fund are the same, it is specific: *Smith's Appeal*, 103 Pa. St. 559.

A bequest of "two thousand dollars of the S. W.," by a person owning ten thousand dollars worth of bonds known by that designation is demonstrative, and not adeemed by the payment thereof to the testator: *Ives v. Canby*, 48 Fed. 718. See, also, *Mathoney v. Holt*, 19 R. I. 660, 36 Atl. 1; *Botkin v. Boykin*, 21 S. C. 513; *Morriss v. Garland*, 78 Va. 215. The collection of certain claims against the government, bequeathed by will, was held to adeem the legacy, if paid during the testator's lifetime, being considered specific, and not demonstrative: *Georgia Infirmary Co. v. Jones*, 37 Fed. 750, making the distinction before referred to, as to the gift out of a fund and the identity of the gift with the fund.

A bequest of "the sum of twelve hundred dollars and interest on the same contained in a bond and mortgage," described in the will, with a subsequent provision that the same is given the legatee for life, with a limitation over, is not a specific, but a demonstrative, legacy, and is not adeemed by the assignment or extinction of the bond and mortgage in the lifetime of the testator: *Giddings v. Seward*, 16 N. Y. 365.

#### IX. Construction by Court.

In construing a legacy, courts lean in favor of a general legacy. Where they are clearly defined, they will be given their legal effect: *Ludlam's Estate*, 13 Pa. St. 188; but, unless clearly so intended, will not be so construed: *Corbin v. Mills*, 19 Gratt. (Va.) 438. The reason for thus leaning against specific legacies is stated as follows, in *Kunkel v. Macgill*, 56 Md. 120: "If the legacy is to be considered specific, then in the event of the testator's parting with the thing or property bequeathed, or if from any cause it should be lost or destroyed, the legacy fails. Then again, such legacies are not liable to abatement with general legacies, nor are they liable to contribution toward the payment of debts. And hence the inclination on the part of the courts to construe legacies as general, unless a contrary intention plainly appears."

#### X. Mortgage as Revocation of Devise.

A devise is not revoked by a mortgage to the devisee: *Baxter v. Dyer*, 5 Ves. Jr. 656, overruling *Harkness v. Bayley*, 1 Prec. Ch. 514. In *McTaggart v. Thompson*, 14 Pa. St. 149, however, the mortgage of an estate devised was considered a revocation pro tanto.

A mortgage executed by a testator after making his will does not manifest an intention to revoke, unless the will or the instrument creating the charge shows such to have been his intention, under an Alabama statute, and any interest or right of redemption or other



right remaining in the testator at his death would fall within the operation of the bequest: *Stubbs v. Houston*, 33 Ala. 555.

In *Yardley v. Holland*, L. R. 20 Eq. 428, the court held that the purchase by the testator of the equity of redemption revoked the devise by his will, not only of the beneficial interest, but of the legal interest in the mortgaged property.

#### XI. Effect of Codicil on Adeemed Legacies.

The authorities uniformly hold that the confirmation of a will by a codicil does not set up a legacy which has been adeemed since the execution of the will: *Ware v. People*, 19 Ill. App. 196; *Howze v. Mallett*, 4 Jones Eq. (N. C.) 194; *Alsop's Appeal* 9 Pa. St. 374; *Garratt's Appeal*, 15 Pa. St. 212; *Montague v. Montague*, 15 Beav. 565; *Cowper v. Mantell*, 22 Beav. 223; *Powys v. Mansfield*, 3 Mylne & C. 359; *Booker v. Allen*, 2 Russ. & M. 270. See, also, *Sidney v. Sidney*, L. R. 17 Eq. 65.

In *Hopwood v. Hopwood*, 22 Beav. 488, a testator, in 1829, directed his trustees to raise five thousand pounds for his son; in 1835, on his son's marriage, he covenanted to pay five thousand pounds to the trustees of his son's settlement. In 1850, after referring to the legacy of five thousand pounds to his son, he directed his trustees to raise a further sum of seven thousand pounds. It was held that the first bequest was not adeemed, and that all three were payable; and that it was a question of intention in making the codicil.

As to a codicil rebutting the presumption of ademption, see *De Groff v. Terpenning*, 14 Hun (N. Y.), 301.

Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy, without more, will not set up the general legacy: *Hertford v. Lowther*, 7 Beav. 107.

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## RAILWAY OFFICIALS ETC. ASSOCIATION v. JOHNSON.

[109 Ky. 261, 58 S. W. 694.]

### INSURANCE AGAINST ACCIDENT—Death by Sunstroke.—

A death by sunstroke must be regarded as due to external, violent, and accidental means within the meaning of a policy of insurance, if it, while exempting the insurer from liability when death is caused by such means, specially provides that if an injury resulting in disability or death is caused by sunstroke, then the liability shall be one-fourth of the sum otherwise payable, unless the insured was acting in the line of his duty as a railway employé. (pp. 371, 372.)

Gordon & Gordon and M. K. Gordon, for the appellant.

C. J. Waddell, Roy Salmon and A. Waddell, for the appellee.

**263** WHITE, J. This is an action on a policy of insurance. After a demurrer to the petition, as amended, had been overruled, appellant declining to plead further, judgment was rendered for appellee as by default, and hence this appeal.

The petition, as amended, alleges a contract of insurance and death of the insured, which was caused, as is alleged, "solely by reason of and through sunstroke while in discharge of his duty as section man and in line of his duty as railroad employé, and that such death was external, violent and accidental, within the meaning of the policy, and was covered by its terms." The provisions of the policy bearing on the question read: "The insurance under this policy shall extend only to physical bodily injury resulting in disability or death, as hereinafter expressed, and which shall be effected while this contract is in force, solely by reason of and through external, violent and accidental means, within the terms and conditions of this contract, and which shall independently of all other causes, immediately, wholly, totally and continuously from the date of the accident causing the injury disable the insured, and prevent him from doing or performing any work, labor, business or service or any part thereof, within the conditions of this contract. . . . If any injury causing disability or death entitling the insured to claim benefits under the provisions of this policy be caused or contributed to . . . by sunstroke or freezing while not in the line of his duty as a railroad employé, . . . then, in such case, the limit of the association's liability shall be one-fourth of the sum otherwise payable, anything to the contrary herein notwithstanding. . . . Injuries intentionally inflicted by the insured, . . . or injuries or death caused or contributed to by disease or **264** infection, . . . are not covered by this policy." It is insisted by counsel for appellant that death caused solely by sunstroke while in the discharge of duty is not covered by the policy; that this is not external, violent, or accidental injury, but is death by reason of disease; and that, therefore, there can be no recovery. If we were to go to the adjudicated cases on this subject, or to reason the case out, much might be said the one way or the other. But we are not left to an interpretation of this policy as to death caused by sunstroke, as to whether it is considered accidental. The policy itself, after providing that injury or death caused or contributed to by disease or in-

fection is not covered by the policy, expressly provides that disability or death caused by or contributed to by sunstroke or freezing while not in the line of his duty as railroad employé shall reduce the liability to one-fourth. There is, then, an express liability where death is caused by sunstroke. If the sunstroke occurs while insured is not in the line of his duty, the liability is one-fourth. This certainly means if the sunstroke be received while in the discharge of his duty there would be full liability. The lower court, being of this opinion, properly, we think, overruled the demurrer. Judgment affirmed, with damages.

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*As to What is Death by Accidental Means* within the meaning of an accident insurance policy, see *Smith v. Aetna Life Ins. Co.*, 115 Iowa. 217, 91 Am. St. Rep. 153, 88 N. W. 368; *Sargent v. Central Acc. Ins. Co.*, 112 Wis. 29, 88 Am. St. Rep. 946, 87 N. W. 796; *Keefer v. Pacific etc. Ins. Co.*, 201 Pa. St. 448, 51 Atl. 366, 88 Am. St. Rep. 822, and cases cited in the cross-reference note thereto. Evidence of the cause of death is the subject of a note to *Meadows v. Pacific etc. Ins. Co.*, 50 Am. St. Rep. 441-443. See *Travelers' Ins. Co. v. Clark*, post, p. 374, and note.

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### NEWMAN v. MANTLE.

[109 Ky. 292, 58 S. W. 783.]

**EXECUTION**—**Mortgaged Chattels, When not Subject to.**—Mortgaged personal property is not subject to levy under execution against the mortgagor, if it has been surrendered by him to the mortgagee to be sold in satisfaction of the debt. (p. 373.)

Bugg & Wickliffe, for the appellant.

J. M. Nichols & Son, for the appellee.

**293** HOBSON, J. L. O. Stapp and W. S. Cooper on September 19, 1894, executed to appellant, D. P. Newman, a mortgage on the personal property here in contest, to secure him as their surety in a note for three hundred dollars. On February 17, 1896, by a written agreement, Newman assumed the payment of the note on which he was surety, secured by the mortgage, in consideration of which Stapp and Cooper transferred and delivered to him the mortgaged property, he accepting it in full satisfaction of the mortgage. The property was then delivered to Eve Stapp, a third party, as agent of appellant, under an arrangement that he should sell it, and apply the pro-

ceeds to the payment of the note, and, if there was any balance, pay that to Stapp and Cooper. After all this had been done, appellee, Mantle, in April, 1896, caused an execution to be issued in his favor against L. O. Stapp, and had it levied on the property. Appellant executed a claimant's bond, and suspended the sale under the execution. He then filed this proceeding, alleging that he was the owner of the property, and praying the discharge of the levy, and for judgment against appellee, and all proper relief. Appellee filed an answer in which he denied appellant's title to the property, and pleaded that, if appellant had made any purchase of the property, it was done to cover it up from Stapp's debts, and that Stapp was the true owner of it. The case was submitted to a jury, and appellant, having proven the above facts, rested his case. Appellee then moved the court to instruct the jury peremptorily to find for him, which was done; and, appellant's motion for a new trial having been overruled, he has appealed.

It is insisted that the peremptory instruction was proper, because there was no reply to appellee's answer, and <sup>294</sup> that the affirmative allegation in it stood admitted. But it was alleged in the petition that appellant was the absolute owner of the property and in possession of it prior to the issuing of the execution, and that L. O. Stapp, the defendant in the execution, had no interest whatever in the property, or any part of it. The affirmative allegations of the answer were in effect only a traverse of these allegations of the petition, and a reply was unnecessary. It is also insisted that the instruction was proper because the proof showed that appellant was not the absolute owner of the property, but Stapp had an interest in it, as the surplus, if any, arising from the sale of it after the payment of the note was to be paid to Stapp and Cooper. While mortgaged property may be sold under execution subject to the mortgage, it does not follow that it may be seized and taken from the mortgagee after it has been surrendered to him to sell in satisfaction of it. He then is more than a mortgagee, and stands as a bailee as to the surplus over and above the mortgage debt. His possession is rightful, and, being acquired before the issuance of the execution, cannot be disturbed under it. In Freeman on Executions, section 120, the rule is thus stated: "The only obstacle to the sale of pledged property under execution against the pledgor is that, the pledgee being entitled to the possession, the officer has no right to seize upon the property in violation of the rights of the pledgee." Again, in sec-



tion 121 it is said that property held by a bailee may sometimes be levied on, but it is added: "When the contract of bailment is such as to give the bailee some beneficial interest in the property, the case is different. An officer acting under an execution cannot by his levy obtain or transfer any greater interest in the property than was <sup>295</sup> possessed by the defendant at the time of the levy. Hence, if a bailee has, as against the owner, the right to retain possession of the property for a specified time, he has the same right as against an officer proceeding under a writ against the owner. The officer cannot, in such a case, lawfully seize the property." In this case, pending the action in the lower court, the property was, by consent of parties, sold by the sheriff, the proceeds of the sale to be held subject to the result of the litigation.

On the facts shown, appellant is entitled to the proceeds of the property, to the extent of his mortgage debt. Judgment reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

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*Mortgaged Chattels* remaining in the possession of the mortgagor are subject to execution against him, but not when they are in the possession of the mortgagee: Second Nat. Bank v. Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306, and cases cited in the cross-reference note thereto. See, also, Collins v. State, 3 Ind. App. 542, 50 Am. St. Rep. 298, 30 N. E. 12.

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## TRAVELER'S INSURANCE COMPANY v. CLARK.

[109 Ky. 350, 59 S. W. 7.]

**INSURANCE AGAINST ACCIDENT—Voluntary Exposure to Unnecessary Danger—Knowledge of the Insured.**—To entitle an insurer to exemption from liability for the death of the insured, on the ground that he voluntarily exposed himself to unnecessary danger, it must appear that he knew of and realized the danger and with such knowledge voluntarily exposed himself to it. (p. 377.)

**INSURANCE AGAINST ACCIDENT.**—The Words "Voluntary Exposure to Unnecessary Danger," when employed in a contract of life and accident insurance, relate to dangers of a substantial character which the insured recognizes and to which he, nevertheless, consciously and purposely exposes himself, intending at the time to assume the risk of the danger. (p. 378.)

**INSURANCE AGAINST ACCIDENT—Voluntary Exposure to Unnecessary Danger.**—One who lies down to sleep on the top of the boilers of a steamboat, and is there injured by steam escaping from a safety valve, is not guilty of voluntary exposure to unnecessary

danger, though warned not to sleep there, unless he was conscious of the danger from the escaping steam from the safety valve. (p. 379.)

**JURY TRIAL.**—An Instruction Which Merely Singles Out the Facts upon Which a Party Relies to escape from liability is properly refused. (p. 379.)

Henry Burnett, for the appellant.

Wheeler & Worten and E. W. Hines, for the appellee.

**353** BURNAM, J. This was an action to recover on a policy of accident insurance. The policy, among numerous other exceptions, provided "that the insurance did not cover death or injury resulting wholly or in part from voluntary exposure to unnecessary danger." The answer alleged: "That the decedent, Nelson Clark, did voluntarily expose himself to unnecessary danger, by and on account of which he lost his life, under these circumstances: The night before he was injured he went upon the boiler deck of the steamer 'Jennie Gilcrist'; that he was not employed in or upon said boat, and had no business on said boat at the time spoken of; that he recklessly and carelessly got upon the top of the boilers of said steamboat, laid down close to the safety pipe of said boiler, and did go to sleep; that the officers of said boat, upon discovering said Nelson Clark in this dangerous position, commanded him to leave the boat immediately **354** and informed him of the great danger he subjected himself to in occupying the position he did on the top of said boiler; that, in spite of said warning, said Nelson Clark, without the knowledge or consent of the officers of said steamboat, and against their warning and advice, again mounted to the top of one of the steam boilers, then filled with steam and again laid down on the top of said boiler, close to the safety valve, and went to sleep; and that he did this after being fully informed and advised of the great danger of such a proceeding on his part.

"While thus lying on the top of said boiler, the steam of said boiler, being under heavy pressure, broke or exploded the safety valve on the top of the steam pipe, and thus permitted the steam to escape onto the person of said decedent, Nelson Clark, and from the effects of which he afterward died; and that, but for negligence and recklessness on his part, the decedent would not have been hurt."

The testimony in the case shows that Nelson Clark, the insured, was employed, with a number of other laborers, to load

railroad ties on barges in the Cumberland river. A steamboat known as the "Jennie Gilerist" was engaged in towing the barges from point to point, and carried with her a little shanty boat provided by the employer, which was used as a sleeping place for the laborers, being fitted up with bunks for that purpose.

In the month of March, 1897, the "Jennie Gilerist" and the shanty boat were moored on the bank of the Cumberland river. On the night before the accident the shanty boat, having become leaky, sank in three feet of water before its occupants discovered the fact that it had sunk, when decedent, in company with a number of other workmen, went from the shanty boat to the steamboat, and slept on deck around and about the boilers. The next day the water was <sup>355</sup> pumped out, and the shanty boat raised, and the next night a siphon pump was run all night to keep the shanty boat from sinking again, and for this purpose steam was kept up in the two boilers of the steamer "Gilerist" under the supervision of the watchman of the boat. Between 9 and 10 o'clock on this night the decedent laid one end of a plank upon the top of the boiler and the other upon the bulkhead running parallel with the boilers, and laid down upon this plank, with his feet toward the boilers, and went to sleep. During the night, and after he had gone to sleep, the steam in the boilers rose above the limit, and the safety valve, in steamboat parlance, "popped off," striking decedent with such force as to knock him off his plank, and inflicting upon him such severe scalds and burns as to cause his death. Davis, the engineer of the towboat, testifies that he saw decedent, the night before the accident occurred, on the top of one of the boilers, and that he told him that it was a dangerous place for him to be, and to get down, and that he did so. He also testifies that there were orders from the captain of the boat not to let the laborers remain on the towboat at night, while the witness Bryant testifies to general orders from the captain forbidding the tie men from coming on the steamboat; and to some extent these statements are corroborated by the witness Phillips, the foreman in charge of the tie men. The testimony for the defendant shows that the shanty boat was in a very dilapidated condition, and was only prevented from sinking by continual pumping, and that they slept the previous night on the towboat, and as close to the boiler as possible, on account of the inclement weather, without objection from anybody. Two separate jury trials resulted in a

verdict for appellee. The first was set aside and a new trial granted by the circuit judge, and to reverse the judgment <sup>356</sup> rendered pursuant to the verdict of the jury upon the last trial this appeal is prosecuted.

Appellant bases its motion for a new trial upon three grounds: 1. Because the court erred in refusing to give a peremptory instruction at the conclusion of all the testimony; 2. Because the court erred in refusing to give jury instruction "y" asked for by the defendant; 3. Because the verdict of the jury is not supported by the evidence or by the law of the case.

While it is alleged in the answer of appellant that the deceased had been informed by some of the officers of the boat that it was dangerous for him to be on top of the boilers, it is not averred that his attention was called to danger from escaping steam, and there is no testimony which conduces to show that the insured was conscious that he was in any danger from escaping steam, or that his attention was called to the safety valve, or to the fact that steam might escape therefrom. The mere fact that he had been told that it was dangerous for him to be on top of the boilers is not sufficient to show that he knew that there was danger from sleeping in such close proximity to the steam valve.

The testimony shows clearly that the escape of steam at the time the insured was scalded was in unusual quantities. To enable appellant to escape liability under the provision of the policy relied on, it is essential that it should show that the assured knew of and realized the danger to him in sleeping in such close proximity to the safety valve, and that with such knowledge he purposely and consciously exposed himself to such risk. In the case of *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167, 21 S. W. 39, the court said: "Consciousness is necessary before there can be voluntary exposure to unnecessary danger within the <sup>357</sup> meaning of the condition in an accident insurance policy against liability in case of injury from such exposure." And in *Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 305, 78 Fed. 754, the court said: "Voluntary exposure to unnecessary danger, within the meaning of an accident insurance policy against liability for injury from such exposure, refers only to dangers of a real, substantial character, which the insured recognized, and to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all risks of the situation." And in *Lehman v. Great Eastern etc. Indemnity Co.*, 7 App. Div. 427, 39 N. Y. Supp.



912, the court said: "To constitute voluntary exposure to unnecessary danger within the meaning of such a condition, an act must be done designedly, and not accidentally, and must have been one done in obedience to and regulated by the will of the person who does it, and who must have intentionally and consciously assumed the risk of the obvious danger."

In *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 263, 48 Am. Rep. 205, the court said: "There is a clear distinction between a voluntary act and a voluntary exposure to danger within the meaning of such a condition in an accident insurance policy. Hidden danger may exist, and exposure thereto without knowledge of the danger does not constitute voluntary exposure to it." In the case of *Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 305, 78 Fed. 754, Justice Harlan used this language: "What do the words 'voluntary exposure to unnecessary danger,' in the contracts in suit, import? The words 'voluntary exposure to unnecessary danger,' literally interpreted, would embrace every exposure of the insured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such an exposure if it might have been avoided by the exercise of ordinary care and diligence on <sup>358</sup> his part. But the same words may be fairly interpreted as referring to dangers of a really substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume the risks of the situation. The latter is most favorable to the insured, does no violence to the words used, is consistent with the object of accident insurance contracts, and is, therefore, the interpretation which the court should adopt." In the light of these opinions the court did not err in overruling appellant's motion for a peremptory instruction, and as the burden of proof was upon appellant, the question was properly submitted to the jury.

Appellant complains that the court erred in refusing to give instruction "y," which is as follows: "The court say to the jury that if they believe from the evidence that the decedent, Nelson Clark, just before he was injured, lay down on a plank, one end of which rested on the boiler of the steamboat 'Gilerist' and went to sleep on said plank while the boiler was filled with steam, and that in the position he occupied he was directly in line of or under the safety valve which was on said boiler, and that while he was asleep he was injured by the escape of steam from said safety valve, then plaintiff cannot recover in this ac-

tion if the jury shall believe that the position in which the defendant placed himself was a dangerous position, and that he voluntarily placed himself in said position, and that he knew, when he placed himself close to the nozzle of said safety valve, that he was in a position of danger, or that he could have known it by the exercise of ordinary care."

This instruction is objectionable, because it authorized the jury to find for the defendant even though insured may have been entirely unconscious of the danger to him which <sup>359</sup> might arise from steam escaping from the safety valve. It is also objectionable as it singles out the facts on which appellant relies to escape liability. We think the instructions given to the jury fairly state the law of the case, and are in accordance with the law as laid down by the text-writers and the decisions of the appellate courts of other states in construing the exceptions relied on in accident insurance policies.

For the reasons indicated, the judgment is affirmed.

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**The Question of What is a Voluntary Exposure to Unnecessary Danger** was considered by the same court in *Campbell v. Fidelity etc. Co. of New York*, 109 Ky. 661, 60 S. W. 492. The insured had been a member of the police force of Shelbyville, but had been removed therefrom, and, on account of his removal, retained a grievance against the mayor and some of the members of the board of trustees. At a time when he was somewhat under the influence of intoxicants he became noisy and disorderly, for which he was reprimanded by a policeman named Duncan, and urged to go home. He knocked the policeman's billy from under his arm and rolled it out of reach three times when he sought to recover it. The insured then drew his pistol and presented it at Duncan's head, who, seeing himself thus threatened, struck up the pistol and drew and fired his own revolver, inflicting a wound from which the insured died within a few minutes. In an action to recover upon the policy insuring against death, the defense was made that no recovery could be had because of the condition of the policy exempting the insurer from liability when the death of the insured was due to his voluntary exposure to unnecessary danger. The court relied upon and quoted from the opinion in the principal case to the effect that, to enable the insurer to escape liability, it is essential that it should show that the assured knew of and realized the danger, and that with such knowledge he purposely and consciously exposed himself to risk, adding:

"In the case of *Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 312, 78 Fed. 761, Mr. Justice Harlan reviewed a number of cases passing upon the question of the construction to be given to language of doubtful import in policies of insurance, and construed the lan-

guage here under consideration as follows: 'What do the words "voluntary exposure to unnecessary danger" in the contracts in suit import? In *First Nat. Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 679, it was said that, if a policy of fire insurance was so framed as to leave it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to a binding contract, the court should lean against a construction that imposes upon the assured the obligations of a warranty. "Its attorneys, officers or agents," the court observed, "prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." The same rule was recognized in *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. Rep. 1019, which was a case of fire insurance; and was upheld in *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 666, 8 Sup. Ct. Rep. 1360, as applicable in a case of life insurance. This court enforced the same rule in *Manufacturers' Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 309, 7 C. C. A. 581, 58 Fed. 945, where this court, speaking by Judge Taft, said that all language in life policies limiting the liability of the company should be construed favorably for the insured; that all doubts or ambiguities should be resolved against the insurer. The words "voluntary exposure to unnecessary danger," literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his part. But the same words may be fairly interpreted as referring only to dangers of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable to the assured, does no violence to the words used, is consistent with the object of accident insurance contracts, and is, therefore, the interpretation which the court should adopt. One of the accepted meanings of the word "voluntary" is, "done by design or intention; purposed; intended": Webster's Dictionary. Judge Clark, who presided at the trial, instructed the jury that: "Mere negligence or inattention is not an exposure to danger within the meaning of the policy—mere thoughtlessness—but it requires a degree of appreciation of danger at the time to make it voluntarily assumed, and a voluntary exposure. . . . If you find that standing on the platform, under all circumstances of this case, taking into account his position on the train, the speed of the train, the track, and everything else that makes up the situation where the accident occurred, if you find that that was dangerous, and that, being con-

scious of the danger, he took a position that exposed him to it, and death resulted, your verdict should be for the defendant, otherwise for the plaintiff, as to that issue." The company was not entitled to a more favorable interpretation of the contract than this instruction indicated.' We think the law applicable to the case at bar upon this question is correctly laid down in the citations given, although the instructions to the jury should, of course, not be given in such argumentative form. In this view of the law, instruction No. 4 is obviously erroneous. It submits to the jury the question of whether Duncan was justified in shooting Campbell, and that only. Duncan's justification and appellant's contract rights may obviously be entirely independent. The instruction, moreover, does not present to the jury what we consider an essential element of the defense presented under this language of the policy, viz., the consciousness of the danger, and the voluntary exposure to it. That the assault upon Duncan was actually dangerous may properly be assumed from the facts in this record."

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*Voluntary Exposure to Danger*, within the meaning of the law of accident insurance, is a conscious or intentional exposure involving gross or wanton negligence: *Johnson v. London etc. Ins. Acc. Co.*, 115 Mich. 86, 69 Am. St. Rep. 549, 72 N. W. 1115; *De Loy v. Travelers' Ins. Co.*, 171 Pa. St. 1, 50 Am. St. Rep. 787, 32 Atl. 1108. The test seems to be, Did the insured appreciate that by doing the act, he was putting life and limb in hazard: *Smith v. Aetna Life Ins. Co.*, 115 Iowa, 217, 91 Am. St. Rep. 153, 88 N. W. 368. To absolve itself from liability, the insurer must not only allege and prove that the insured exposed himself to danger, but also that he knew of such danger and voluntarily exposed himself to it: *Conboy v. Railway Officials' etc. Assn.*, 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363. See, also, *Union Casualty Co. v. Harroll*, 98 Tenn. 591, 60 Am. St. Rep. 873, 40 S. W. 1080; *Collins v. Bankers' Acc. Ins. Co.*, 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778; *Willard v. Masonic etc. Acc. Assn.*, 169 Mass. 288, 61 Am. St. Rep. 285, 47 N. E. 1006; *Sargent v. Central Acc. Ins. Co.*, 112 Wis. 29, 88 Am. St. Rep. 946, 87 N. W. 796; note to *Travelers' Ins. Co. v. Jones*, 12 Am. St. Rep. 272-274.



## MORROW v. BAILEY.

[109 Ky. 359, 59 S. W. 2.]

**FRAUDULENT CONVEYANCE—Homestead.**—If land is exempt as a homestead, its conveyance cannot be in fraud of creditors. (p. 382.)

**HOMESTEAD, When not Liable for Pre-existing Debts.**—A homestead cannot be made liable for the debts of the owner on the ground that it was not paid for until after such debts were contracted, if the payment for it was made by selling off parts, and it is the residue only which it is sought to be subjected to execution. (p. 383.)

Holt, Alexander & Holt and H. Tower, for the appellants.

John G. Bailey, for the appellee.

**361** HOBSON, J. Sam Morrow, on October 11, 1884, bought of J. W. Givens four and three-fourths acres of land, for which he agreed to pay him two hundred and thirty-seven dollars and fifty cents, and Givens made him a deed, retaining a lien for the purchase money. Morrow at once erected a cabin on the land, and moved into it with his family. In the years 1885, 1886 and 1887 he raised crops of tobacco, the proceeds of which were paid Givens on the land. About the year 1891 he sold off to four other parties nearly three and one-quarter acres of the land, and they paid the purchase money to Givens. This left about one and a half acres, which he still owned free of encumbrance for the purchase money, except five dollars due by one of the vendees, and still unpaid. Previous to this, however, in the year 1889, Sam Morrow became indebted to the appellee, Bailey, in the sum of twenty-five dollars, for which Bailey recovered a judgment against him. In October, 1892, Bailey caused an execution on his judgment to be levied on one and one-half acres of the land still owned by Morrow, and had it sold, and in due time obtained a writ of possession against Morrow for it. About the time that the execution was levied on the land, Morrow conveyed it by deed to appellants, and they filed this suit against Bailey to prevent his disturbing them in the enjoyment of the property or executing his writ of possession against them. The court below, on final hearing, dismissed their petition.

The deed from Sam Morrow to appellants was without valuable consideration, and was void as against his creditors, if the land was then subject to execution. But if the land was then

exempt as a homestead, appellee, as a creditor, was not prejudiced by the conveyance; for he <sup>362</sup> could not have subjected the land to his debt in that event, if the conveyance had not been made. The proof is clear that the whole land was not of value over three hundred dollars; that the improvements were all erected on it several years before appellee's debt was created; and that Morrow had resided on it with his family since about the time of the purchase.

The only ground upon which it is claimed that the land was subject to appellee's execution is that when his debt was created the land had not been paid for, and that, as it was paid for after the creation of his debt, it was not exempt as a homestead: *Moseley v. Bevins*, 91 Ky. 269, 15 S. W. 527.

But it will be observed that, although the land was paid for in part after the creation of appellee's debt, the payment was made by selling off parts of the original tract, the vendees paying the purchase money directly to Givens, and thus releasing the remainder of the land. The case would be essentially the same if Sam Morrow had reconveyed to Givens the lots he thus sold to these parties, and Givens had, in consideration of the conveyance to him of these lots, released his lien upon the remainder still held by Morrow. The statute provides that the homestead shall not exist "if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements thereon": Ky. Stats., sec. 1702. The fact that Morrow bought more land than he could pay for, and extinguished the lien on the land by selling off the part that he could not pay for, so as to leave him a part of the land not unencumbered does not bring him within the letter or spirit of this statute. He in fact purchased and paid for that part of the land which was left to him, and erected his improvements on it, before appellee's debt was created. The vendor's <sup>363</sup> lien was the first charge on all of the land. If this had been foreclosed, and the three acres sold to satisfy it, undoubtedly Morrow would have been entitled to his homestead in the remainder of the land, and when he did himself what the court would have done the result must be the same.

It follows, therefore, that the land was exempt from execution as a homestead at the time of the levy and sale under the execution, and that appellants were entitled to the relief sought.

Judgment reversed, and cause remanded for a judgment and further proceedings not inconsistent with this opinion.

*The Transfer of a Homestead* cannot be in fraud of the grantor's creditors: *First Nat. Bank v. Browne*, 128 Ala. 557, 86 Am. St. Rep. 156, 29 South. 552; *Eagle v. Smylie*, 126 Mich. 612, 85 N. W. 1111, 86 Am. St. 562, and cases cited in the cross-reference note thereto. See, in this connection, *Hamby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967, 64 S. W. 1067; *Dulion v. Harkness*, 80 Miss. 8, 92 Am. St. Rep. 563, 31 South. 416.

*A Homestead May be Purchased* with nonexempt property, as against pre-existing debts not reduced to judgment: *Paxton v. Sutton*, 53 Neb. 81, 68 Am. St. Rep. 589, 73 N. W. 221. In this case it is said that one may apply nonexempt property to the discharge of encumbrances on a homestead, and claim the whole property as exempt, citing *Randall v. Buffington*, 10 Cal. 493; *In re Henkel*, 2 Saw. 350, Fed. Cas. No. 6362.

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### JARBOE v. SHIVELEY.

[109 Ky. 402, 59 S. W. 328.]

**MORTGAGE—Renewal of Note.**—If a mortgage is given to secure a debt, a change in the debt by the giving of a new note does not deprive the mortgagee of the benefit of his security. (p. 386.)

**SURETY—Mortgage to Secure is not Released by the Execution of a New Note.**—If a mortgage is given to secure sureties, and they and the principal are subsequently obliged to give a new note in renewal of the old one, the mortgage continues in force for the purpose of indemnifying them for payments which they may be compelled to make on the note of renewal. (p. 387.)

C. S. Hill, for the appellant.

John McChord and Wright & Moss, for the appellee.

**403 BURNAM, J.** The appellee, Robert Shiveley, instituted suit in equity against William B. Moser and wife on two notes, for one hundred and eighty-seven dollars and fifty cents each, dated on the sixth day of February, 1895, and due respectively on the first days of January and July, 1896, and asked for the enforcement of a mortgage lien, given simultaneously with the execution of the notes, on a tract of three hundred and twelve acres of land, to secure their payment. Subsequently appellants, John Jarboe and C. B. Lockett, filed a petition to be made parties to the proceeding, and made same a cross-petition against Moser and wife, and alleged that they each became sureties for the defendant W. B. Moser on a note executed to C. L. Ballard on the seventeenth day of February, 1882, for the sum of two hundred and twenty dollars, and so continued as sureties on said note to Ballard until the eighteenth day of June, 1892,

when they and the principal, W. B. Moser, were compelled to, and did, borrow from the Marion National Bank of Lebanon, Kentucky, the sum of two hundred and fifty-two dollars, with which to pay the note to Ballard's executor; that Moser executed to the bank his note for this amount, with petitioners continuing as his sureties, and with the proceeds of which they paid Ballard's executor the principal and interest of the original note; that since the execution of the note to the <sup>404</sup> bank it has been renewed by Moser, with these petitioners as sureties, from the — day to the — day of —, 1898; that on the tenth day of September, 1898, the Marion National Bank instituted suit thereon against Moser and petitioners, and recovered judgment thereon for two hundred and ninety-four dollars and ten cents, and ten dollars and thirty-five cents costs, and that the petitioners were compelled to, and did, pay said judgment and costs, as Moser was insolvent; that at the time they signed said note to Ballard, above set out, Moser and wife, in order to indemnify them against loss on account of their suretyship, did, on the seventeenth day of February, 1882, execute a mortgage to said petitioners on the same tract of land mortgaged to appellee, and they allege that by virtue of said mortgage they have lien on the land to secure a repayment to them of the money so paid to the bank, superior to the claim of plaintiff. A general demurrer was filed and overruled to the answer of appellants. Thereupon appellee filed answer to the cross-petition of Jarboe and Luckett, in which he alleges, in substance, that the mortgage executed by Moser and wife to appellants for two hundred and twenty dollars had been fully paid off at the time the note was so executed by Moser to the bank, to which appellants demurred, and the court sustained the demurrer to the answer to the cross-petition of appellants, and carried it back, and dismissed their petition, in effect holding that the payment of the debt due Ballard's executor with the money borrowed from the bank was a satisfaction and discharge of the mortgage, notwithstanding the fact that appellants continued as sureties for Moser on the note to the bank, and were subsequently compelled to pay it.

The mortgage, after reciting the borrowing of the money from Ballard, and the suretyship of appellants, says: "Now, in order to save R. J. Jarboe and C. P. Luckett <sup>405</sup> harmless in said suretyship, we have this day sold and mortgaged," etc. The question is, Has this condition of the mortgage been complied with? Have Jarboe and Luckett been held harmless in the



liability incurred for Moser upon the faith of the lien given them by the mortgage? While the original debt to Ballard was paid, appellants were not discharged from liability. On the contrary, they were compelled to incur a new liability to the bank in order to secure the funds with which to pay Ballard's executor, and were finally compelled to pay the debt to the bank. The contingent liability had now become a real one. It was held by this court in *Burdett v. Clay*, 47 Ky. 295: "When a mortgage is given to secure a particular debt, a change of the debt by taking a new note does not deprive the mortgagee of the benefit of the mortgage security, and the assignment of a note secured by a mortgage carries with it the mortgage lien, which is not destroyed by the renewal of the note to the assignee; nor was the security lost by the taking of a new note with personal security, or a second mortgage." And in *Roberts v. Bruce*, 91 Ky. 379, 15 S. W. 872, it was held "that when a surety, in order to enable the principal to raise the money to pay the debt for which he is bound, becomes surety to a new creditor, he is entitled, notwithstanding the change in the creditor to retain any indemnity in his possession or under his control." In *Louisville Banking Co. v. Leonard*, 90 Ky. 106, 13 S. W. 521, it was held that a mortgage upon real estate for a certain sum, given to secure future advances, was valid. In *Moore v. Thompson*, 100 Ky. 231, 37 S. W. 1042, it was held "that where a maker of accommodation notes executes to the payee and his sureties a mortgage to indemnify them as his sureties and indorser, and upon the maturity of the notes they were renewed by <sup>406</sup> the accommodation indorser and all of the original securities except one, the name of the original principal being left off of the mortgage made to indemnify them, he was not released, it satisfactorily appearing that the new notes were given for the same debt." Brandt (*Brandt on Suretyship and Guaranty*, section 188) says: "Where a mortgage is given for the indemnity of a surety, it remains valid for that purpose, notwithstanding the evidence of the debt or the instrument by which the surety is bound may be changed." And he illustrates the principle by a reference to *Patterson v. Martin*, 7 Ohio. 225, where it was held "that a mortgage to secure accommodation indorsers on a note payable to a particular bank, and so described in the mortgage, is valid to secure the same indorsers, though that bank did not discount the note, and another bank discounted a similar note for the same purpose, with the same indorsers." In *Jones on Mortgages*, fifth edition, section 924,

it is said: "No change in the form of indebtedness or in the mode or time of payment will discharge the mortgage. The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different evidence of the debt." And in section 926 the same authority says: "Whether a new note shall be treated and have effect between the parties as a payment of the former one, for which it is substituted, will depend upon the purpose and understanding of the parties to the transaction, which may be determined by express agreement, or by the circumstances attending the transaction." The American and English Encyclopedia of Law (first edition, volume 15, page 870) says: "A mortgage lien will only be extinguished by payment or release, or by some act operating as an estoppel; and therefore <sup>407</sup> the continued existence of a mortgage remains unaffected by the substitution of a new note or bond, or by the giving of an instrument of a wholly different character to that of the original evidence of indebtedness, or even by the execution of a new note and mortgage, if the mortgage is left undischarged. So long as the indebtedness in fact remains, any change in the evidence of it shall not be allowed to prejudice the security." It may be stated as a general rule that a change in the form of a debt does not satisfy the mortgage given to secure it, unless it is so intended to operate. It can only be destroyed by the payment or discharge of the debt, or by release of the mortgage. This is a rule in equity sanctioned by many adjudicated cases. Mere form is disregarded. The substance only is considered. The appellants have never been discharged from the original liability, and there was no purpose or intention to waive the mortgage lien given to protect them by the mere change in the payee of the liability so incurred by them, and it does not necessarily have this effect. The circuit judge erred in sustaining the demurrer. Judgment reversed and cause remanded for proceedings consistent with this opinion.

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*The Taking of a New Note* in substitution for one secured by a mortgage does not discharge the mortgage, unless such is the intention of the parties: *Austin v. Bailey*, 64 Vt. 367, 33 Am. St. Rep. 932, 24 Atl. 245; *Bunker v. Parron*, 79 Me. 62, 1 Am. St. Rep. 282, 8 Atl. 253; *Kern v. Hotaling*, 27 Or. 205, 50 Am. St. 710, 40 Pac. 168.

## CURTIS v. HELTON.

[109 Ky. 493, 59 S. W. 745.]

**HOMESTEAD Acquired with Check for Pension Moneys.**—A homestead acquired in exchange for a check issued for pension moneys exempt from execution is, nevertheless, subject to execution on a debt created previously to the purchase of such homestead. (p. 389.)

B. F. Day & Son and A. T. Wood, for the appellant.

**494** **GUFFY, J.** Certain creditors of the appellant Curtis obtained judgments and caused executions to issue thereon, which were levied on twenty acres of land as the property of said Curtis, and the same was purchased by the appellee under sale made by virtue of said execution, and afterward instituted the proceeding to obtain possession of said land. The appellant made defense by answer, the substance of which is that he is a bona fide house-keeper, with a family, and was residing upon said land at the time the judgments were rendered and sale made, and that said land was worth less than one thousand dollars, and claimed that it was exempt from execution. The answer further shows that he received a pension amounting to less than one thousand dollars for services as a volunteer soldier in the service of the United States, that a pension check therefor was issued to him, and that by the laws of the United States and of Kentucky the same was in no way subject to the payment of debts, and was exempt from attachment, distress or execution. It is further alleged that, without converting said check into money, he exchanged the same for the land in controversy, and that said land is worth less than one thousand dollars, and that he paid no other sum except the pension check therefor, and that he owned no other land except the land in controversy. **495** The court sustained the demurrer of the appellee to said answer, and, the appellant failing to plead further, judgment was rendered in favor of the appellee, and from that judgment this appeal is prosecuted.

The contention of appellant is that the pension check or money could in no event be subjected to the payment of the debt in question, and therefore he had a right to invest it in a homestead, which was in like manner exempt from seizure and sale. It is certain that the pension check could not have been subject to the payment of the debt in question. We are referred

by appellant to various decisions of this court holding that a party may sell his homestead, and invest the proceeds in another homestead, which will remain exempt from execution. We are also referred to decisions sustaining the right of the owner of a homestead to make any disposition thereof that he desires to. For instance, he may make a voluntary conveyance of same, or he may convey it to a creditor with a view to prefer such creditor to other creditors, and no such conveyance can be successfully attacked, or set aside, or subjected to the payment of any debt: See *Brame v. Craig*, 12 Bush, 404; *Pribble v. Hall*, 13 Bush, 61; *Cooper v. Arnett*, 95 Ky. 603, 26 S. W. 811; *Lear v. Totten*, 14 Bush, 101; *Musgrave v. Parish*, 10 Ky. Law Rep. 998, 11 S. W. 464. It is insisted for appellant that the same principle should be applied to the investment or reinvestment of the pension in question, it being contended that the reasoning of the decisions, *supra*, should apply to the investment of the pension aforesaid; the contention being that the reason for the doctrine announced in the decision *supra* is that, the homestead being exempt from execution, no creditor has a right to complain of any disposition that the owner may make of the homestead; that no creditor could look to the <sup>496</sup> homestead for the payment of his debt, and hence could not be prejudiced by the disposition made of it; and that, the law being the same as to a pension, the same doctrine should be applied to the disposition made thereof. We have carefully considered the argument of appellant, and concede that there is much force in his reasoning. But this court has expressly decided the question. There is no claim in this case that the debt originally sued on was created after the purchase of the homestead, and the sole question is whether the land is exempt from execution because purchased with a pension check, which is confessedly beyond the reach of creditors. This court, in *Johnson v. Elkins*, 90 Ky. 163, 13 S. W. 448, considered and decided the identical question involved in the case at bar. The court said: "It appears that the land was paid for with pension money of the debtor, drawn from the United States government. The money itself never came to his hands. The check for it did, and was indorsed by him to one Hoover, who, for the debtor, drew the money upon it, and out of it paid Noe for the land. It is now claimed that the money, when paid to Noe, was in the course of transmission to the pensioner, and being, therefore, exempt from seizure for the debts of the pensioner by the United States statute, it was no



fraud upon his creditor to invest it in the land and have the deed taken to the wife. Section 4747 of the Revised Statutes of the United States provides: 'No sum of money due, or to become due, to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the sum remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of <sup>497</sup> such pensioner.' It has been repeatedly decided by this court that, after the money reaches the hands of the pensioner, it is no longer exempt: *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878; *Hudspeth v. Harrison*, 6 Ky. Law Rep. 304. In the last-named case it was held that the fact that the land was purchased with pension money did not exempt it from liability for the pensioner's debts. In the case of *Sims v. Walsham*, 9 Ky. Law Rep. 912, 7 S. W. 557, the money itself did not come to the hands of the pensioner, but a check did, and he transferred it to another person, with directions to draw the money, and pay it to his sons, to be, and which was, used by them in paying for land, which was conveyed to them. It was held that the land so held by them by voluntary conveyance was liable for the pensioner's debt. These cases are decisive of this one, so far as this question is concerned." This decision and the other decisions therein referred to are conclusive as to the question in the case at bar. It might be well for the general government or the state to provide by law that a pensioner might invest a pension in a homestead, to be exempt to the same extent as the pension check is exempt. But until such a law is enacted, we must declare the law as it now exists. Under the authorities before quoted, the land in contest must be held subject to seizure and sale under execution for debt existing before the purchase. It may be proper to remark that a homestead is entirely a creature of statute law, and the statute giving a homestead provides, in effect, that the land purchased after creation of a debt shall be subject to seizure and sale in satisfaction thereof. Judgment affirmed.

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*Pension Money* is exempt from any legal process the purpose of which is to subject it to the debts of the pensioner: *Falkenburg v. Johnson*, 102 Ky. 543, 80 Am. St. Rep. 369, 44 S. W. 80. And the later authorities tend to establish the rule that property purchased with it by him is also exempt: See the monographic notes to *Cullen v. Harris*, 66 Am. St. Rep. 386; *Rozelle v. Rhodes*, 2 Am. St. Rep. 596-598.

A *Homestead* purchased with the proceeds of another homestead carries the exemption of the first homestead: *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448. But see *State Bank v. Dougherty*, 167 Mo. 1, 90 Am. St. Rep. 422, 66 S. W. 932. And the proceeds of a voluntary sale of exempt personal property, designed to be invested in other property to take the place of that sold, are not subject to attachment or garnishment: *Cullen v. Harris*, 11 Mich. 20, 66 Am. St. Rep. 380, 69 N. W. 78.

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## SMITH v. SPRAGINS.

[109 Ky. 535, 59 S. W. 855.]

**SURETY Signing a Bond on Condition that It Shall also be Signed by Another Specified Person.**—If one signs a replevin bond and delivers it to a deputy sheriff on condition that he shall not return it until it is signed by one P., but the officer returns it to the court without P.'s signing, the surety is entitled, on a petition in equity, to have a cancellation of the bond decreed. (pp. 392, 393.)

Samuel J. Sayler, for the appellant.

James Goble, for the appellees.

**536** DURELLE, J. Appellant Smith filed his petition in equity against the appellees, seeking the cancellation of a replevin bond signed by him as surety for the members of the firm of T. B. Pinson & Sons. The averments upon which the relief is sought are that deputy sheriff Runyons, holding an execution against T. B. Pinson & Sons, went, in company with T. B. Pinson, to Smith, and asked him to sign a replevin bond to replevy the execution, and that it was then and there agreed and understood that the bond should be signed by one Ford and two Pinsons, not defendants in the execution, whose names appeared in the body of the bond, before it was by Smith; and it was further represented that, if Smith signed, it was with the agreement and understanding that G. W. Pinson, who was then known to Smith to be solvent, had agreed to sign the replevin bond, and was to and would sign it, and under this agreement Smith signed; that, in violation of the agreement, the sheriff, or one of his deputies, returned the bond to the circuit clerk's office without G. W. Pinson having signed it; that the bond is attested by one Cecil, deputy sheriff, when in fact Cecil was not present at the signing by Smith; and that such return was false and untrue, and made through fraud or mistake on the part of Cecil.

It was further averred that Runyons knew at the time the bond was executed that Smith was induced to sign it under the agreement that G. W. Pinson was to and would sign it, and had agreed so to do. By amendment it was further averred that the bond was signed by Smith in the presence <sup>537</sup> of, and delivered to, Deputy Sheriff Runyons as an escrow, upon condition that the deputy was not to return or deliver the bond until it had been signed by Pinson, but was returned and delivered by him in violation of this agreement. A demurrer was sustained to the petition as amended.

Appellees rely upon the doctrine that if a surety signs a note under an agreement with the debtor that he is not to become bound until another signs it, and the principal, in violation of the agreement, delivers it to a creditor without knowledge of the agreement, the surety is bound: *Smith v. Moberly*, 10 B. Mon. 267, 52 Am. Dec. 543. But in *Whitaker v. Crutcher*, 5 Bush, 622, which was an action upon a supersedeas bond, the defense was made that it was not acknowledged or delivered unconditionally, but executed as an escrow only, and placed in the hands of the officer with directions to deliver it as the defendant's act and deed when the principal in the bond sued on should become the surety of the defendant in another bond.

Said the court, reviewing the action of the trial court: "And the court properly observed the principle, which was held by this court in the case of *Carswell v. Renick*, 7 J. J. Marsh. 281, and recognized in *Millett v. Parker*, 2 Met. (Ky.) 614, that a conditional delivery of a bond to a clerk, who was authorized to take such a bond, was not necessarily a delivery to the obligee, and that consequently the instrument might be so delivered as an escrow merely." This seems to us directly in point, and conclusive of the question that upon the petition Smith was entitled to be allowed to prove that the bond was delivered conditionally to the sheriff. It is true this same case is quoted to support the contention of appellees: "The principle is well settled that, although a surety execute a note or bond in <sup>538</sup> pursuance of a parole agreement with his principal that it is only to become binding upon him on conditions, if the instrument is, nevertheless, delivered to the obligee, or officer authorized to accept it, without information to him of such agreement, it will bind the surety, notwithstanding the agreement: *Smith v. Moberly*, 10 B. Mon. 266, 52 Am. Dec. 543; *Garvin v. Mobley*, 1 Bush, 48."

But we are of opinion that the deputy sheriff who held the execution was the officer authorized to accept the bond, and that

under the averments of the petition as amended he did not accept it without information to him of the alleged agreement. It may be that on the return of the case it can be shown—assuming the averments of the petition to be true—that the plaintiff (appellant) has been guilty of such laches in the delay in bringing his suit for over eight months as will estop him from claiming the relief sought, but we think that, on the averment of the petition, he is entitled to an opportunity to introduce his testimony.

For the reasons given, the judgment is reversed, and cause remanded, with directions to overrule the demurrer to the petition as amended, and for further proceedings consistent herewith.

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*A Surety Who Signs a Bond* on condition that it is not to be delivered until others sign it is nevertheless bound, if the bond is delivered without such signatures, unless the obligee has notice of the condition: *Spencer v. McLean*, 20 Ind. Ap. 626, 50 N. E. 769, 67 Am. St. Rep. 271, and cases cited in the cross-reference note thereto; *Benton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 67 Am. St. Rep. 310, 75 N. W. 632; monographic note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 194, 195.

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## MANHATTAN LIFE INSURANCE COMPANY v. PATTERSON.

[109 Ky. 624, 60 S. W. 383.]

**INSURANCE—Paid-up Policy, Within What Time May be Demanded.**—If a life insurance policy provides that if a cause of forfeiture accrues after the policy has been in force for three years, the insurer will, on the surrender of the policy within six months after the lapse issue a nonparticipating paid-up policy for such sum as the legal net reserve at the time of the lapse will purchase as a single premium, the time specified within which the surrender may be made is not of the essence of the contract, and the insured is entitled to a paid-up policy, though he does not demand it for nearly five years. (pp. 399, 400.)

Henry W. Burnett and D. B. Logan, for the appellant.

Thomas J. Bigstaff, for the appellee.

**627** DURELLE, J. In November, 1897, the appellee obtained from appellant company a life policy for five thousand dollars on the twenty payment life plan. He paid five consecutive an-



nual premiums, and, nearly five years after making default in the payment of the sixth premium, applied to the company for a nonparticipating paid-up policy for such sum as the legal net reserve on the policy at the time of lapsing would purchase as a single premium at the company's published rates. On the pleadings, judgment was rendered against the company. On this appeal, the case of *Hexter v. United States etc. Ins. Co.*, 91 Ky. 356, 15 S. W. 863, and *Northwestern etc. Ins. Co. v. Barbour*, 92 Ky. 429, 17 S. W. 796, are relied on; although in the case of *Mutual Life Ins. Co. v. Jarboe*, 102 Ky. 80, 80 Am. St. Rep. 343, 42 S. W. 1099, this court said, in an opinion by Judge Guffy: "To the extent, if any, that the principles announced in the decisions in *Northwestern etc. Ins. Co. v. Barbour*, and *Hexter v. United States etc. Ins. Co.* conflict with the doctrine announced in *Montgomery v. Phoenix etc. Ins. Co.*, 14 Bush, 51, they are overruled."

Appellant undertakes to show that the cases of *Hexter* and *Barbour* were not in conflict with *Montgomery v. Phoenix etc. Ins. Co.*, 14 Bush, 51, and were distinguished from it in the opinions rendered in those cases; that in the *Jarboe* case it was expressly decided that the facts of that case brought it directly within the principles announced in the *Montgomery* case; that, therefore, it was not within the principles laid down in the *Hexter* and *Barbour* cases, which had been distinguished from the *Montgomery* case, and, not being in conflict with the *Montgomery* case, have not been overruled at all, because they were overruled to the extent only that they were in conflict with it. Following counsel's logic out to its legitimate conclusion, <sup>628</sup> the clause in the *Jarboe* opinion which overrules those two cases, in so far as they conflict with the *Montgomery* case, is absolutely without meaning, because there is nothing to which the language of the opinion can apply. In order to properly consider this argument, we must examine the provisions of the policies in the four cases referred to, in connection with those in the case at bar. Counsel concedes that "the rulings of this court on the question as to whether or not time is of the essence of a contract such as is involved in this appeal have not been apparently harmonious."

In the *Montgomery* case, in which a most carefully prepared and elaborate opinion was delivered by Judge Cofer, the policy was a ten year endowment, and contained this provision: "It being understood and agreed that if, after the receipt of this company of not less than two or more annual premiums, this

policy should cease in consequence of the nonpayment of premiums, then, upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for two years shall have been made, it will issue a policy for two-tenths of the sum originally insured." It also contained a provision that, if the annual premiums were not paid on the dates fixed, "then in every such case the said company shall not be liable for the payment of the whole sum assured, but only for a part thereof, proportionate with the annual payments made as above specified, and this policy shall cease and determine." At the time the last payment became due upon which any payment was made there was a partial payment in cash, and a note executed <sup>629</sup> for the unpaid amount, which provided: "And it is hereby understood and agreed that, if the amount of this note shall not be paid when due, the said policy shall be null and void." The note was not paid, no demand was made for its payment, no offer to return it or the last cash payment was made, no other premiums were paid, and the insured died without surrendering his policy or demanding a new one over three years after the execution of the note. It was held that the widow, who was the beneficiary under the policy, might recover five-tenths of the amount of the policy, subject to deduction for the amount due upon the notes.

In the Hexter case the policy provided that, if the premiums should not be paid on or before the days mentioned for the payment thereof, "then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine; provided that if, after the receipt by this company of not less than two whole years' premiums, this policy should cease in consequence of the nonpayment of premiums, then upon the surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for a proportion of the premiums paid." More than two years' premiums were paid, and after the death of the insured, and nearly fifteen years after the last payment of premium, suit was brought for an amount proportionate to the premiums paid. In an opinion by Judge Bennett it was held that a recovery could not be had, stress being laid upon the provision that on default of payment the company "shall not be liable

to the payment of the sum insured, or any part thereof," notwithstanding the fact that in the same sentence it was "provided <sup>630</sup> that if, after the receipt by this company of not less than two whole years' premiums, this policy could cease in consequence of the nonpayment of premiums, then upon the surrender of the same provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for a proportion of the premiums paid." The opinion distinguishes the case then in hand from the Montgomery case, and does not in express terms overrule the earlier case. But the argument of the opinion is exactly the reverse of the argument in the Montgomery case, and it is quite difficult to discover any stable ground for distinguishing the facts in the one case from those of the other, except upon the ground that a delay of nearly fifteen years was unreasonable. That ground, however, does not appear to have been relied upon, and the opinion has, we think, been uniformly regarded as overruling the doctrine laid down in the Montgomery case.

In *Northwestern etc. Ins. Co. v. Barbour*, 92 Ky. 431, 17 S. W. 796, the policy was on the ten payment life plan, and six and one-half years' premiums were paid, and a note executed for the next premium falling due, which was never paid. An additional policy had been obtained, upon which two and one-half years' premiums were paid. About three years after default in payment suit was brought for a paid-up, nonparticipating policy. The policy provided: "The said company further promises and agrees that if, after two or more annual premiums shall have been paid in cash, default shall be made in the payment of any premium or interest on the day it shall become due, it will issue a paid-up, nonparticipating policy for as many tenth parts of the original sum insured as there shall have been annual premiums so paid, provided <sup>631</sup> this policy be then freed from all indebtedness to the company, and provided, also, that written application be made therefor, and this policy, and all interest therein, be surrendered in the lifetime of the insured, and within six months from the date of such default. . . . If the said premiums shall not be paid at or before the times above mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine. . . . In every case where this policy shall cease or become null and void all payments thereon shall be forfeited to the company, except as above provided, and, except that in case the person whose life is insured die by his own hand, the company shall return the premiums re-

ceived, less dividends paid." In an opinion by Judge Holt, then chief justice, this case was decided in favor of the insurance company, upon the ground that time was of the essence of the contract, and that the policy did not, by its provisions, cease pro tanto, and a portion of the insurance remain in force, but the entire policy determined. This case also is distinguished in the opinion from the Montgomery case, and the cases which followed its reasoning, of *Johnson v. Southern Mut. Life Ins. Co.*, 79 Ky. 403, *Northwestern Mut. Life Ins. Co. v. Fort*, 82 Ky. 269, and *Southern Mut. Life Ins. Co. v. Montague*, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443, and was decided upon the authority of the Hexter case. It is equally difficult to see any sound reason for distinguishing the provisions of this policy from the Montgomery policy, and this case has also been uniformly regarded as a departure from the principles announced in the Montgomery case.

In considering all contracts, the effort of the court is, and should be, to ascertain the intention of the parties, who are, to that end, assumed to be persons of ordinary understanding. And it would be difficult, indeed, for a <sup>632</sup> person of ordinary understanding to see a difference in the intent of the parties to the contract between a provision that upon default of payment of premiums the policy should cease and determine, and that if, after receipt of two premiums, the policy should cease in consequence, then upon a surrender, provided it is made within twelve months, a new policy should be issued (which is, in substance, the provision in the Montgomery case); and a provision that if, after two annual premiums have been paid, default shall be made, the company will issue a paid-up policy for a proportionate part of the sum insured, provided the policy be surrendered within six months from the date of default, coupled with a provision that, in case the policy shall cease, all payments shall be forfeited to the company, except as above provided (as in the Barbour case); and a provision that, in case of default in payment of premiums, the company shall not be liable to the payment of the sum insured or any part thereof, and the policy shall cease and determine, provided that if, after payment of two years' premiums, the policy should cease, then upon surrender thereof, made within twelve months, a new policy should be issued (as in the Hexter case). A person of ordinary intelligence, reading these three provisions, would, it seems to us, undoubtedly reach the conclusion that, except with reference to the time provided for, they meant the same thing, and that if



time was not of the essence of the contract in the one case it was not so in the other.

In the case of *Holly v. Metropolitan Ins. Co.*, 105 N. Y. 437, 11 N. E. 507, cited by appellant, it was said: "In cases where the meaning is not entirely plain, and where it is capable of two constructions, one involving forfeiture and the other being fair and reasonable, and supporting <sup>633</sup> the obligation of the policy against the insurer, that construction is preferred by the courts which does not involve forfeiture, not only because it is not so harsh, but also because, if the language is doubtful, it is that employed by the insurer, and should be taken most strongly against him."

And so in the *Jarboe* case, the twenty year distribution policy provided, as shown by the record: "Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is hereby expressly waived. . . . If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided." It further provides: "After three full annual payments have been made upon this policy, the company will, upon the legal surrender thereof, before default in payment of any premiums, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full years' premiums paid bears to the total number required. . . . No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy." After payment of three premiums default was made, and over four <sup>634</sup> years after default suit was brought to compel the issuance of a paid-up policy in accordance with the provision quoted. It was held, in an opinion by Judge Guffy, quoting liberally from the opinion of Judge Cofer in the *Montgomery* case, that the principles announced in that case applied to the case under consideration, "and we adhere to the doctrine announced in that decision." And while it was said in the opinion that the facts

in the Jarboe case were essentially different from the Hexter case, and that the Barbour case was unlike the one in hand, nevertheless the doctrine of the Montgomery case was expressly reaffirmed, and the Hexter and Barbour cases were expressly overruled, in so far as they conflicted with it. By the reaffirmance of the Montgomery case, and the overruling of the decisions in the Hexter and Barbour cases, it was intended to decide that there had been a departure from the principles of the Montgomery case, and that the court returned to its original doctrine.

When we come to consider the case at bar, we find a provision in the policy which, in our opinion, conveys to the ordinary mind the same meaning which is conveyed by the provisions in the Montgomery and Jarboe cases: "If any premium or interest on any note given on account of a premium be not paid when due, or if the insured die in consequence of any violation of law, . . . this policy shall be void, and all payments made upon it shall be forfeited to the company, except after being in force three full years; . . . and if it shall lapse or become forfeited for the nonpayment of any premium or interest on any note given on account of a premium, the company will, upon the surrender of this policy within six months after such lapse, issue a nonparticipating, paid-up policy for such sum as the legal net reserve on this <sup>635</sup> policy at the time of lapsing will purchase as a single premium, at the company's present published rates." It is argued for appellant that this provision is not substantially different from the provisions referred to in the Hexter and Barbour cases. We concur in this view. But we are also of opinion that there is no substantial difference between the provisions construed in those cases and those in the Montgomery and Jarboe cases. The right to continue the five thousand dollar policy in force by the payment of premiums was gone. In that respect the policy had become void. The payments made upon it could not be recovered. They had been "forfeited to the company, except" that, as the policy had been in force three years, the right remained in the beneficiary to a paid-up policy for an amount proportionate to the net reserve upon the policy, which right, together with concurrent insurance in the full sum of five thousand dollars, had been paid for by the payment of the premiums. The policy was null and void, except for this remaining right. This right was absolute, and, while it is provided that the company would issue a paid-up policy "upon the surrender of its policy within six months after such lapse," the time was not of the essence of the contract.

The whole consideration had gone. There is no pretext appearing in the record that the performance of its contract for which it had received payment was more oppressive at the time it was demanded than if it had been demanded within the six months provided for. Some argument is made that the delay in making the demand imposed upon the company the burden of unnecessary bookkeeping. This we do not regard as sufficiently burdensome to justify retaining the purchase money and refusing to deliver the goods. As said in the *Montgomery* case: "The premiums, by express <sup>636</sup> convention, paid for both current insurance and a paid-up policy, and now to deny to the assured the benefit of a paid-up policy because the old one was not surrendered in time is, in the strictest and most obnoxious sense, a forfeiture. Such a claim is without support in reason, justice, or authority, and cannot be sanctioned in a court of equity." For the reasons given, the judgment is affirmed.

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*An Insured Person is Entitled to a Paid-up Policy* when his policy of insurance provides that he shall be entitled to a paid-up policy, in proportion to the premiums paid, after having made three annual payments, if he surrenders the original policy before default, or within six months after default in the payment of premiums, although he fails to surrender the original policy within six months after default, and to demand the issuing of the other within that time: *Mutual Life Ins. Co. v. Jarboe*, 102 Ky. 80, 80 Am. St. Rep. 343, 42 S. W. 1097. See, also, *Southern Mut. Life Ins. Co. v. Montague*, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443; *Wileox v. Equitable Life Assur. Soc.*, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857; and compare *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519; *Universal Life Ins. Co. v. Whitehead*, 58 Miss. 226, 38 Am. Rep. 322.

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## TEAGER v. CITY OF FLEMINGSBURG.

[109 Ky. 746, 60 S. W. 718.]

**MUNICIPAL CORPORATIONS—Streets—Liability for Defects in.**—While a city governing body may exercise its discretion in the selection of a plan of street improvements, if the plan adopted is unsafe for travelers, the municipality is liable, but when the plan is one that many prudent men might approve, or where it is so doubtful whether the one as planned by the city governing board is safe or dangerous that different minds may entertain different opinions with respect to it, the benefit of the doubt must be given to the city, and it exonerated from liability. (pp. 401, 402.)

**MUNICIPAL CORPORATIONS—Streets with Uneven Grades.** A city is not bound to maintain an even or perfect grade in its streets and pavements. (p. 402.)

**MUNICIPAL CORPORATIONS—Streets, Permit of Stepping-stones in.**—The construction of a sidewalk with a step which, from the nature of the grade, the municipal authority thinks proper, is not such negligence as will support a recovery against the city by one injured by stumbling on such step and falling. (p. 403.)

Thomas L. Given, G. A. Cassidy and John P. McCartney, for the appellant.

W. G. Dearing and O. R. Bright, for the appellee.

**748** O'REAR, J. Appellant was injured while traveling along the streets of the city of Flemingsburg, January, 1899. He fell, breaking a thumb, making its amputation necessary. The fall was caused, he alleges, by his stumbling on a step made in the pavement of the street he was walking. This step was four or five inches high. He sues the city, alleging that the step was not necessary, and was in itself dangerous to those passing over it. On the trial it developed as an undisputed fact that there was a slight grade in the street for some distance before the point where the step was made, and that the purpose of this step was two-fold: 1. To level the grade to some extent; and 2. Thereby to serve as a watershed, throwing the surface water of the street from the pavement. There was nothing to show that the step was out of repair, or unskillfully constructed. Some of appellant's witnesses testified that, in their opinion, the step was dangerous; others, that it was not. But this was not because of any special manner of construction. It seems that some of the witnesses thought any step was necessarily dangerous to pedestrians at night. And this is doubtless true to some extent. The circuit court having at the close of plaintiff's evidence given a peremptory instruction in favor of the **749** city, we are brought to consider whether the building a sidewalk with a step, which, from the nature of the grade, the city government deemed necessary and proper, is of itself such negligence as will warrant a recovery by one injured in a fall caused by the step. The city, when it assumes to construct sidewalks, engages to do so in a reasonably safe manner, affording pedestrians reasonably safe conditions of travel, they at the time using due caution. The rule is fairly stated in Dillon on Municipal Corporations, section 1019, as follows: "A municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe



condition for travel in the ordinary modes, by night as well as by day." The same author lays down the further rule that this implied liability of the corporation is only on the ground of negligence. "The liability is not that of a guarantor of the safety of the traveler. The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. It is under no obligation to provide for everything that may happen upon them, but only for such things as ordinarily exist, or such as may be reasonably expected to occur": Dillon on Municipal Corporations, sec. 1015. It is argued for the city in this case that the plan of street improvements is one within the discretion of the council, and not to be interfered with by the courts. Some authority is cited from other states supporting this contention. But we rather incline to the view that, while the city governing body may exercise its discretion in the selection of a plan of street improvement, if the plan adopted is one palpably unsafe to travelers, the city would be liable. But <sup>750</sup> when the plan is one that many prudent men might approve; or where it would be so doubtful upon the facts whether the street as planned or ordered by the city governing board was dangerous or unsafe or not—that different minds might entertain different opinions with respect thereto—the benefit of the doubt should be given the city, and it should not be held liable. To this effect we find *Gould v. City of Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822; *City of Madison v. Ross*, 3 Ind. 236, 54 Am. Dec. 481; *Mayor etc. v. Bailey*, 2 Denio, 433. Nor is the city bound to maintain an even or perfect grade of its streets and pavements: *Town of Gosport v. Evans*, 112 Ind. 133, 2 Am. Rep. 164, 13 N. E. 256. We are cited the case of *Blyhl v. Village of Waterville*, 75 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817, in support of appellant's claim. In that case the municipality had adopted a plan for constructing a plank walk, requiring a drop or step seven or eight inches high. The appellant was injured by stumbling over this step in the night-time. The court found that the step was unnecessary, and there was no reason for having it. This decision seems to be contrary to those of New York, Pennsylvania, Michigan, Indiana and Kansas; and, furthermore, in that case Judge Cauty dissented, saying: "Unless it appears that the alleged defect is of ministerial origin, it must appear that there is such gross mistake in the adoption of the plan as would imply a failure to exercise the legislative judg-

ment. If two reasonable minds might have adopted different plans, the legislative judgment can not be impeached for having adopted either one of those plans." In *Dubois v. City of Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273, the plaintiff was injured by stumbling and falling over a stepping-stone placed in one of the defendant's sidewalks. In denying his right of recovery, the court used this language: "It would be extending the rule <sup>751</sup> of the liability of municipal corporations far greater than has yet been done in any decided case to hold that they are liable for assenting to the placing of stepping-stones on the edge of sidewalks in front of hotels, stores, public buildings and private residences. The courts have gone quite far in holding such corporations to a very strict responsibility in reference to accidents caused by the failure of their officers to keep the streets and sidewalks in a proper and safe condition, but it would be adding to the corporate liability beyond reasonable limits to hold that stepping-stones, which are almost a necessity in providing for the interests, comfort and convenience of the public in the maintenance of walks, avenues and streets, constituted a nuisance or obstruction, and that corporations are liable for damages by reason of accidents caused thereby." It may frequently be, and we know it is sometimes, necessary to break the angle of sidewalk grades by steps. The determination of the necessity and the plan should be left to the discretion of the governing or legislative body of the city, subject to control in cases of such manifest error or mistake as would indicate a failure to consider or a purpose to misconstrue the work. The ruling of the lower court in giving the peremptory instruction being in accord with these views, the judgment is affirmed.

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*A Municipal Corporation* is held liable, in *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817, for injuries sustained by a pedestrian who falls over a step or drop some seven or eight inches high in the sidewalk. But in New York, it has been decided that a stepping-stone on a sidewalk near the curb is not such an obstruction as will give one who stumbles over it a right of action: *Robert v. Powell*, 168 N. Y. 411, 85 Am. St. Rep. 673, 61 N. E. 699; *Du Bois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MICHIGAN.**

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PEOPLE v. CURTIS.

[129 Mich. 1, 87 N. W. 1040.]

**INTOXICATING LIQUORS—Sale to Minor—Intent.**—If a statute prohibiting the sale of liquor to a minor without a written order does not make knowledge of the minority an ingredient of the offense, belief by the seller that the minor is of age does not constitute a defense. (p. 405.)

T. J. Cavanaugh and Hammond & Hammond, for the appellant.

D. Anderson, prosecuting attorney, for the people.

<sup>1</sup> MONTGOMERY, C. J. The sole question presented in this case is whether a druggist who sells liquor to a minor without any written order from the parent or guardian of such minor may prove, by way of defense, that, from the appearance or statements of the minor, the respondent believed him to be more than twenty-one years of age.

The statute (2 Comp. Laws, sec. 5381) provides that: "It shall not be lawful for any druggist, . . . directly or indirectly, . . . to sell, furnish, give, or deliver any spirituous, malt, brewed, fermented or vinous liquor . . . to a minor, except for medicinal or mechanical purposes, on the written order of the parent or guardian of such minor."

<sup>2</sup> Whether, under statutes of this character, it is essential to show an intent to violate the law, the authorities are not altogether agreed. In *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365, it was held that the provision of this statute which requires that saloons shall be closed on the first day of the week imposed a positive duty upon the respondent to see

at his peril that the saloon was closed. Mr. Justice Cooley, in his opinion, said: "Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."

Numerous cases are cited to support this position, and, among them, cases from various states supporting the rule that, where a statute prohibiting sale to a minor does not make knowledge of the minority an ingredient of the offense, belief that the minor was of age will not constitute a defense. So we have held in numerous cases since that, in enactments providing police regulations, there are many cases in which intent is not to be held an ingredient of the offense: *City of Grand Rapids v. Bateman*, 93 Mich. 135, 53 N. W. 6; *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449, 71 N. W. 497; *People v. Longwell*, 120 Mich. 311, 79 N. W. 484.

But it is contended that this court laid down a rule which, as to sales to minors, makes the intent an ingredient of the offense, in the case of *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374. The language of the opinion, it is true, is very general; but it is to be construed in connection with the statute which was being considered at the time (Act No. 231, Pub. Acts 1875). That statute was entitled, "An act to prevent the sale or delivery of intoxicating liquors, wine and beer to minors," etc.; and, while it contained a provision in the first section making it unlawful to sell to a minor, section 4 also provided a penalty against the minor for misrepresenting his age. Whether it was the view of the court that this section was an indication<sup>2</sup> that a criminal intent was necessary under the first section, we have no mean of knowing definitely; but of this case it was said by Mr. Justice Cooley in *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365: "It was held in *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374, under a former statute, that one should not be convicted of the offense of selling liquors to a minor who had reason to believe, and did believe, he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril."

This is followed by the citation of numerous authorities where similar statutes have been so construed. It is apparent, therefore, that *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374,



rested upon the peculiar terms of the statute then in force, which contained provisions not found in the present liquor law.

The question was again considered, as affecting saloon-keepers, in *People v. Welch*, 71 Mich. 548, 39 N. W. 747. The section there under consideration is the one corresponding to 2 Compiled Laws, section 5391, which contains, among other provisions, the following: "The fact of selling, giving, or furnishing any liquid in any place where intoxicating liquors are sold or kept for sale, to any minor, . . . shall be prima facie evidence of an intent on the part of the person so selling, giving, or furnishing such liquid to violate the law."

The court, in construing this section, places stress upon the concluding words of the section, which were held to indicate that intent was an element of the offense, inasmuch as it provided, in effect, that the furnishing of liquor should be but prima facie evidence of an intent to violate the law. Mr. Justice Champlin said: "The question which confronts us here is whether the legislature, in making it unlawful to sell liquors to minors, created an offense for which the person selling would be culpable, irrespective of his intent to violate the law. <sup>4</sup> Had the last clause of section 13 (Act No. 313, Pub. Acts 1887), above quoted, been wholly omitted, it would not be material to the offense. But the language of that clause plainly infers that the offense cannot be made out without there exists on the part of the accused an intent to violate the law." Section 5381, which governs the present case, contains no such limitation, and we think it should be held that intent is not an ingredient of this offense, but that, like many other police regulations, this statute imposes upon the seller the duty of ascertaining the fact at his peril.

The conviction will be affirmed.

The other justices concurred.

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*One Who Sells Liquor* to a minor, though innocently ignorant of the fact, incurs the penalty of the law prohibiting such sales: *State v. Sasse*, 6 S. Dak. 212, 55 Am. St. Rep. 834, 60 N. W. 853; *Redmond v. State*, 36 Ark. 58, 38 Am. Rep. 24. Compare *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614, and see *Fox v. State*, 94 Md. 143, 89 Am. St. Rep. 419, 50 Atl. 700; *State v. Heldenbrand*, 62 Neb. 136, 89 Am. St. Rep. 743, 87 N. W. 25.

## KLASS v. CITY OF DETROIT.

[129 Mich. 35, 88 N. W. 204.]

**STATUTE OF LIMITATIONS—Estoppel to Plead.**—A defendant is not estopped to plead the statute of limitations, unless it can be fairly said that he is responsible for deceiving the plaintiff, and inducing him to postpone action upon some reasonably well-founded belief that his claim will be adjusted if he does not sue. (pp. 410, 411.)

W. F. Atkinson, for the appellant.

P. J. M. Hally, A. B. Hall and T. E. Tarsney, for the appellee.

**36** HOOKER, J. The plaintiff claims to have been injured through a failure of the defendant to keep its street in repair on the 31st of December, 1895. On January 7, 1896, his petition was presented to the common council in compliance with the statute (section 46 of an act approved June 1, 1895), which provides that: "No action shall be brought against said city, nor any of its boards, commissions or officers, for any negligent injury, unless it be commenced within one year from the time when the injury was received, nor unless notice shall be given in writing, within three months from the time of such injury, to the head of the law department, or to his chief assistant, of the time, place and cause of such injury, and of the nature thereof. The provisions of this section shall not be a bar to a suit for any injury for which there is now a lawful cause of action, but for every such injury suit shall be commenced within six months from the time when this act shall take effect": Act No. 463, Local Acts 1895.

The action in this cause having been commenced on March 23, 1897, the court directed a verdict for the defendant upon the ground that it was barred by the statute, and the plaintiff has brought it to this court by writ of error.

The plaintiff's testimony shows that in January, 1896, the claim was referred by the council to its committee on claims and accounts, and that testimony was taken before such committee in June, September, October and December, 1896, and in January, February and March, 1897, the last being taken about ten days previous to the time the action was begun, when the city counselor told plaintiff's counsel that a settlement could not be made. The committee **37** made a report to the council on September 1, 1896, adverse to the claim, with the recom-

mendation that the prayer of the petitioner be denied, and this report was accepted and adopted on that day. The plaintiff was not aware of the report or its adoption, and his counsel testified that negotiations with the corporation counsel and committee for a settlement were going on up to March, 1897, when he was informed that a settlement could not be made, and suit was commenced. Counsel for the plaintiff contends that these facts estop the city from claiming the benefit of the statute. The case of *Renackowsky v. Board of Water Commrs.*, 122 Mich. 613, 81 N. W. 581, is cited in support of this contention. It holds that where a defendant has, by its conduct, deceived a plaintiff into the belief that a suit to enforce his rights is unnecessary, and thereby lulled him into a feeling of security, and induced him to forego suit in expectation of a settlement, the statute will not bar an action.

Defendant's counsel urged, and the trial court appears to have been of the opinion, that the action of the council in disallowing the claim in September, 1896, deprived the committee of further power, and that its subsequent action was not the action of the council. The committee never had authority to do more than to investigate and report, and with the acceptance and adoption of its report its authority ended. There is no indication of secrecy on the part of the council. Its action was public, and it was published. There was no obligation upon it to notify plaintiff or his counsel of its action, and there is nothing in the record to show why the committee or city counselor permitted negotiations to continue after such report. We are not informed that these negotiations were more than a listening to importunities of plaintiff's counsel, and a patient hearing and investigation of what he had to offer, with a view to recommend some recompense for plaintiff's injury if convinced that he had a meritorious case, notwithstanding the statute had run against his right of action; and there is nothing to indicate that the members <sup>38</sup> of the committee had a suspicion that plaintiff did not know that the council had taken action, and there is nothing in the record that indicates that the council, or even the committee or city counselor, supposed that the plaintiff was deferring the commencement of suit in reliance on a supposed intention to adjust his claim.

The statute is an unambiguous limitation on the right to bring an action after the lapse of a year. It was presumably known to the plaintiff and his counsel. The common council was under no obligation to take any action, and, had it pursued

that policy, the plaintiff could not maintain an action not begun within the statutory period. But the council did take action, and solemnly resolved that plaintiff had no legal claim, by adopting the report of the committee. It did not notify the plaintiff, and it was under no obligation to. The case is barren of the usual elements of an estoppel, and is therein plainly distinguishable from the case of *Renackowsky*, supra. That case was heard upon demurrer to a declaration which alleged that the defendant recognized plaintiff's right of action, made payments thereon, and adopted a resolution, before the statute had run, to the effect that the plaintiff should receive full pay so long as he was disabled, and that it finally declined to pay after the statute had run. In the case of *Armstrong v. Levan*, 109 Pa. St. 177, 1 Atl. 204, upon which the *Renackowsky* case is based, a distinct promise to pay was made in consideration that the plaintiff would not sue. So in the case of *Voorheis v. Peoples' Benefit Society*, 91 Mich. 474, 51 N. W. 1110, Mr. Justice Long says: "The company could not delay the party entitled to bring suit by promises of payment and overtures for settlement beyond the period fixed for bringing the suit, and then set up in its defense that the action was not brought within the limit of time stated in the contract." This case, however, did not involve a statute of limitation.

The legislature has found reason for requiring actions <sup>39</sup> against cities to be promptly brought, and a strict construction of its enactment would defeat all actions brought after the expiration of the period fixed by law. It is a legal maxim that nothing can interrupt the running of the statute of limitation, and it is commonly stated without any qualification. But the courts have engrafted upon statutes of limitation an exception based upon estoppel. This seems to be limited to cases involving an intentional or negligent deception, and the remedy used to be a bill in equity to enjoin the pleading of the statute: *Holloway v. Appelget*, 55 N. J. Eq. 583, 62 Am. St. Rep. 827, 40 Atl. 27. See 13 Am. & Eng. Ency. of Law, 719, and notes. In the case of *Derrick v. Lamar Ins. Co.*, 74 Ill. 404, it was held that where there was a compromise and settlement of the loss upon an insurance policy within the period prescribed by the policy for a commencement of suit, which compromise was afterward found to be fraudulent upon the part of the company, and suit was brought upon the policy seasonably after the fraud was discovered, but not within the period prescribed, the company was estopped to make the de-



fense of the limitation provided by the policy, upon the ground that it had waived such right by holding out a reasonable hope of adjustment: See, also, *Peoria etc. Ins. Co. v. Whitehill*, 25 Ill. 466; *Farmers' etc. Ins. Co. v. Chesnut*, 50 Ill. 112, 99 Am. Dec. 492. Where a prior suit was dismissed upon the promise by the defendant to pay or settle plaintiff's claim, and the statement that there was no use of proceeding in the courts, the court held that the defendant was estopped from pleading the statute of limitations: *Home Ins. Co. v. Myer*, 93 Ill. 271. Where parties agreed that the plaintiff should accept the defendant's account in discharge of all or a part of its claims against the defendant, when they should be afterward settled or adjusted, and defendant, relying upon this agreement, was induced not to bring his action, it was held that the plaintiff was estopped to plead the statute of limitations: *Swofford Bros. Drygoods Co. v. Goss*, 65 Mo. App. 63. To the same effect is the case of <sup>40</sup> *Missouri Pac. Ry. Co. v. B. F. Coombs & Bro. Commission Co.*, 71 Mo. App. 299. In *Barcroft v. Roberts*, 91 N. C. 363, it was held that a party would not be allowed to set up the statute of limitations in bar of the debt where it appeared that the delay in suing was caused by the promise by himself or attorney that the claim would be settled, and no advantage should be taken of the lapse of time: See, also, *Gentry v. Barron*, 109 Ga. 172, 34 S. E. 349; *Union Trust Co. v. Peters*, 72 Miss. 1058, 18 South. 497; *Lengar v. Hazlewood*, 11 Lea, 539; *Matthews v. Matthews*, 66 Miss. 239, 6 South. 201.

In *Moore v. Moore*, 103 Ga. 517, 30 S. E. 535, it was held that a mutual mistake does not create an estoppel to plead the statute of limitations. In North Carolina it was held that a request not to sue will not stay the statute, but it must be an agreement not to plead it: *Havmore v. Commissioners of Yadkin*, 85 N. C. 268; *Hill v. Hilliard*, 103 N. C. 34, 9 S. E. 639; *Raby v. Stuman*, 127 N. C. 463, 37 S. E. 476. In *McFaddin v. Prater* (Tex.), 3 S. W. 306, it was held that an innocent misrepresentation concerning the boundary between the lands of the parties would not estop the pleading of the statute. In *Railway Conductors' Benefit Assn. v. Loomis*, 124 Ill. 560, 32 N. E. 424, where there were no promises to pay, and nothing holding out hopes of adjustment, it was held that there was no estoppel.

It is apparent from the foregoing that the usual rules pertaining to estoppel should be applied in such cases, and that the defendant will not be precluded from availing himself of such

defense unless it can be fairly said that he is responsible for deceiving the plaintiff, and inducing him to postpone action upon some reasonably well-grounded belief that his claim will be adjusted if he does not sue. In both of the cases cited by counsel such estoppel rested upon a promise to pay, and in one, if not both, there was an express promise not to sue, induced by the promise to pay. As said in the Armstrong case, all <sup>41</sup> of the elements of an estoppel were present. Here they were not all present. It does not appear that those assuming to act for the city knew that plaintiff was ignorant of the action of the council, or knew that the plaintiff was forbearing to sue by reason of the negotiations; and there is an absence of anything in the nature of a promise to pay as a consideration for forbearance, and of anything in the nature of a recognition of plaintiff's right of action. Unless we are to say that the statute is a bar in no case when negotiations are continued beyond or renewed after the period of the statute, we cannot sustain plaintiff in his contention, and we find no case justifying so broad a rule.

The judgment of the learned circuit judge is affirmed.

The other justices concurred.

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#### ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS.

##### I. By Agreement or Promise.

- a. Agreement not to Plead Statute.
- b. Oral Agreement.
- c. Agreement to Pay Debt.

##### II. Fraud.

##### III. False Representations.

##### IV. Subscription to Stock.

##### V. Administrators and Heirs.

##### VI. Mortgages.

##### VII. Purchases of Land.

##### VIII. Individual Instances of Estoppel.

##### I. By Agreement or Promise.

a. Agreement not to Plead Statute.—Notwithstanding some conflict in the authorities, the great weight of legal adjudication and the universal trend of modern cases firmly establish the rule that an agreement or promise, whether oral or written, by the debtor not to plead the statute of limitations, made before the expiration of the statutory period, and relied upon by the creditor, until after the statutory period has expired, operates as an estoppel in pais as against the debtor, and precludes him from interposing the defense of the statute to defeat the action. Among the many cases in which this rule has been announced may be cited the following: Holman v. Omaha etc. Bridge Co., 117 Iowa, 268, 94 Am. St. Rep.

293, 90 N. W. 833; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; *Swofford v. Goss*, 65 Mo. App. 55; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Gaylord v. Van Loan*, 15 Wend. 308; *Quick v. Corlies*, 39 N. J. L. 11; *Haymore v. Commissioners*, 85 N. C. 268; *Barcroft v. Roberts*, 91 N. C. 363; *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481; *Burton v. Stevens*, 24 Vt. 131, 58 Am. Dec. 153; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177. As opposed to these cases and to the rule above announced are the cases of *Crane v. French*, 38 Miss. 503, 1 Am. Rep. 548, *Shapley v. Abbott*, 42 N. Y. 443, and *Andrear v. Redfield*, 98 U. S. 225.

The prevailing rule may be illustrated by some of the leading cases which sustain it. Thus, in *State Loan etc. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600, the court announced the rule that sureties sued upon a bond are estopped to plead the statute of limitations, when, pending the running of the statute they signed a written request for delay in proceedings against them, until they should request further proceedings, and agreed in writing to waive all advantage which might result from the delay requested, in consideration of which request and promise the plaintiffs forbore to sue for a period of years.

If an officer of a railroad company negotiates with a person injured on its cars, and, acting for the company assures him that the statutory limitation will not be interposed, intending that he shall rely upon such assurance, and he, so relying, delays in bringing an action until after the expiration of the statutory period, the company is estopped from pleading the statutory bar: *Holman v. Omaha etc. Bridge Co.*, 117 Iowa, 268, 94 Am. St. Rep. 293, 90 N. W. 833.

In *Cowart v. Perrine*, 21 N. J. Eq. 101, it was determined that a defendant who has agreed not to set up the statute of limitations will not be allowed to do it, and that such agreement, although it does not amount to a new promise, will operate by way of estoppel, in cases where the statute has not fully run, and the plaintiff has forbore to sue in consequence of the promise, and that such rule is not confined to courts of equity, which follow courts of law in giving effect to this statute.

A promise by the debtor before the debt is barred to waive the statute of limitations in consideration of a forbearance to sue is not contrary to public policy and estops the debtor from pleading such statute: *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555. Defendants will not be allowed to plead the statute of limitations in bar of plaintiff's claim when the delay which would otherwise give operation to the statute has been induced by their request expressing or implying their agreement not to plead it: *Haymore v. Commissioners*, 85 N. C. 268. A person will not be allowed to set up the statute of limitations in bar of a debt, if it appears that the delay in suing was caused by the promise of himself or his attorney, relied upon by the creditor, that the matter would be settled and no

advantage taken of the lapse of time: *Barcroft v. Roberts*, 91 N. C. 363.

The bar of the statute of limitations is removed and the defendant is technically estopped from setting up the defense of such statute, where, after notes are signed by him, he signs an agreement on the back thereof, to the effect that he would not take advantage of the statute of limitations on such notes: *Burton v. Stevens*, 24 Vt. 131, 58 Am. Dec. 153. In the very well-considered case of *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555, sustaining the rule announced by a great majority of the authorities, the cases existing at the time of writing that decision are ably reviewed as follows:

“The rule is thus well stated in 1 Wood’s Limitations of Actions, second edition, section 76: ‘while a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay it, yet if made before the statute is barred, and in consideration of forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires . . . by way of estoppel.’ In *Warren v. Walker*, 23 Me. 453, the supreme court of Maine, while holding that the waiver of the statute of limitations in that case amounted, ‘neither to an acknowledgment, or a promise to pay,’ yet held it was sufficient to obviate the statute on the ground of estoppel, saying: ‘Now a covenant not to sue an obligor in a bond is tantamount to a release of the obligation; and an agreement in writing never to sue on a parol contract has a similar effect’: *Foster v. Purdy*, 5 Met. 442. By a parity of reasoning, the memorandum in this case should preclude the defendant from setting up this defense. This view of the subject is very much strengthened by the case of *Webber v. Williams College*, 23 Pick. 302. In that case Webber held a note, purporting to be signed by a person acting as agent for the defendants. When it had stood nearly six years the plaintiff demanded payment. The treasurer of the defendants wrote to the plaintiff, saying if he would forbear suing then he should have the same rights he then had for one year more; and this the plaintiff complied with. The court considered this agreement to be a waiver of the defense, afterward attempted to be set up under the statute, ‘as it was entered into before the limitation was complete.’ In *Webber v. Williams College*, 23 Pick. 302, Chief Justice Shaw delivered the opinion and he states the facts of that case even more strongly than the supreme court of Maine in *Warren v. Walker*. He states that when the proposition was made to plaintiff to forbear for a year, he replied, ‘he would not consent to postpone bringing his action as proposed, but in point of fact he did so postpone it till after the six years,’ and that court was of the unani-



mous opinion 'that this is a sufficient compliance with the defendants' offer, that they were bound by it, and that it is a good waiver of the statute of limitations.' This case is also in point on the first paragraph of this opinion, in that it was not mooted by court or counsel that the waiver of the statute in the slightest degree affected the other defense of want of power in the agent to bind the college and upon which plaintiff was forced to a nonsuit. In *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652, the note was dated April 28, 1818, payable six months after date. On the twenty-sixth day of August, 1824, the defendant, the maker of the note, signed this stipulation, 'whereas the Utica Insurance Company hold my note, dated April 28, 1818, indorsed by C. C. B., for nineteen hundred dollars, now, therefore, I hereby agree not to plead the statute of limitations in a prosecution for any balance that may be due on said note.' The defendant pleaded the statute. The court for the correction of errors held, Judge Jacob Sutherland delivering the opinion, that 'the defendant is estopped by his stipulation from availing himself of the statute of limitations.' In *Gaylord v. Van Loan*, 15 Wend. 308, the action was on three notes. The defendant pleaded the statute of limitations. The plaintiff as to the third note replied that the discharge was obtained by fraud. The evidence tended to prove that the attorney told defendant he must sue him, unless the notes were renewed. To which defendant replied 'he would not avail himself of the statute and a suit need not be brought on that account.' Judge Nelson, speaking for the court, said: 'Two of the notes were barred when the defendant agreed that he would not avail himself of the statute. As to those notes it cannot be said that the agreement operated as a fraud upon the plaintiff, by inducing a delay in the commencement of the suit, . . . but it may well be said as to the third note, which was not due at the time of the agreement. Although we cannot, upon any consistent reasoning, infer a new promise to pay the notes from what was said by the defendant, taking the whole together, yet, as it respects the note not then barred, we do not say that the plaintiff is entirely remediless. The agreement not to plead the statute, as respects this note, operated as a fraud upon the plaintiff. Had it not been made, he could have prevented the effect of the statute by commencing his suit. By pleading the statute, the defendant is guilty of bad faith, and, upon general principles, should be estopped from availing himself of that defense. No one ought to be permitted to disregard his own deliberate, lawful agreement, to the injury of another. The principle which should debar the defendant from setting up the defense in this case is a familiar one; the only difficulty is in the mode of its application. In the case of *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652, the stipulation not to plead the statute was in writing, but its being in writing does not add anything to its legal effect, unless it be under

seal. It is of no greater efficacy or higher credit in court than an agreement resting in parol, when proved.' In *Armstrong v. Levan*, 109 Pa. St. 177, 1 Atl. 204, it appeared that Armstrong, the prothonotary, negligently failed to index a judgment in favor of Mrs. Levan whereby a junior judgment creditor secured a preference, and she lost her lien. Before the running of the statute, her attorney called upon the clerk and said to him that, unless he adjusted it he would sue, whereupon the clerk agreed that if Mrs. Levan would not sue him, and suffered loss by his mistake, he would make it good. When sued he pleaded the statute. Said the court: 'The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise, if she was thereby lulled into security, and thus allowed the six years to go by before she commenced her suit, with what grace can the defendant now set up the statute? The promise operated not to revive a dead tort, but as by way of estoppel. It has all the elements of an estoppel. The plaintiff relied and acted upon it; she has been misled to her injury; but for the defendant's promise she would have commenced her action before the six years had expired.' To the same effect in all respects is the decision of the supreme court of North Carolina, in *Barcroft v. Roberts*, 91 N. C. 363. See, also, *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702; *Haymore v. Commissioners*, 85 N. C. 268; *Hill v. Hilliard*, 103 N. C. 34, 9 S. E. 639; *Quick v. Corliss*, 39 N. J. L. 11. In *Cowarts v. Perrine*, 21 N. J. Eq. 101, in discussing what constitutes an estoppel, Chancellor Zabriske said: 'As long as the agreement really caused the complainant to delay a suit, it would come within the reasons on which an estoppel in pais is founded. When the act or promise of one man causes another to do, or forbear to do, something which he would otherwise have done, the other is estopped from taking advantage of the act or omission, caused by his own act or promise.' And this is the doctrine of the federal courts: *Randon v. Toby*, 11 How. (U. S.) 493; *Mann v. Cooper*, 2 App. D. C. 226, opinion by C. J. Alvey.

"Opposed to all these authorities is the opinion of Earl, C. J., in *Shapley v. Abbott*, 42 N. Y. 443, 1 Am. Rep. 548, and *Hodgdon v. Chase*, 29 Me. 47. The grounds upon which Judge Earl reached his judgment were: 1. That a promise not to plead or to waive the statute was 'an acknowledgment or promise to pay,' and therefore fell within the statute, an assumption and a promise which we think we have shown is contrary both to the natural and ordinary meaning of the words of the statute and opposed to the decisions of many of the highest courts of the land; 2. That a promise not to plead the statute made before the debt was barred, and accepted and acted upon by the creditor, did not create an estoppel in pais, because both parties were equally well informed of the facts, a

position refuted by all the decisions just cited, and by none more clearly than by this court, beginning with *Taylor v. Zepp*, 14 Mo. 482, 55 Am. Dec. 113, and adhered to throughout the judicial history of the state; 3. Because he says there is no valuable consideration to support such a promise. 'A valuable consideration is a benefit to the party promising, or to a third party at his request, or an inconvenience, loss, or injury, or the risk of it to the party promised': 4 *Minor's Institutes*, pt. 1, p. 16. From time immemorial an agreement to forbear to sue has been held to be a valuable and sufficient consideration, and it was so held in *Glasscock v. Glasscock*, 66 Mo. 627, upon a review of all the common-law authorities: *Bishop on Contracts*, enlarged ed., secs. 57-63; *Chitty on Contracts*, 11th Am. ed., 35. By such forbearance the creditor is delayed and the debtor is or may be benefited; so that there concur both the ordinary grounds upon which a valuable consideration may be rested. Nor is it an objection that no specific time of forbearance was agreed upon, for in such a case the law will imply a reasonable time: *Glasscock v. Glasscock*, 66 Mo. 627. With due respect for the distinguished jurist who delivered the opinion in *Shapley v. Abbott*, 42 N. Y. 443, 7 Am. Rep. 548, we cannot concur in his premise that there was no consideration for the promise. On the contrary, we hold that a forbearance to sue is one of the commonest examples of valuable consideration to be found in the common-law reports. The decision in *Hodgdon v. Chase*, 29 Me. 47, is a dogmatic statement of the court's conclusion without responding to the able and, to our minds, conclusive argument of counsel to the contrary, and is at variance with *Trask v. Weeks*, 81 Me. 325, 17 Atl. 162, in which the court said, commenting upon *Warren v. Walker*, 23 Me. 458, and distinguishing the two cases: 'Thus it is seen that this case differs materially from that of *Warren v. Walker*, in which the contract contained, as shown in the opinion, nothing which could be construed into a promise, but was a simple waiver of the statute founded upon a sufficient consideration. In *Hodgdon v. Chase*, 29 Me. 47, a much more restricted agreement and one more nearly like that in *Warren v. Walker*, if not of the same effect, was treated as intended for an acknowledgment and new promise. Otherwise, it could not have been rejected for not being in writing; for no statute requires a contract not to set up the statute in defense simply to be in writing'': *Bridges v. Stephens*, 132 Mo. 538-543, 34 S. W. 555.

It has been held that as to a promise by the debtor not to plead the statute of limitations relied upon by the creditor, the statute runs against such promise as well as the principal debt, and after the period of the statute has run against such promise, the debtor is not estopped to plead the limitation as a defense: *Cameron v. Cameron*, 95 Ala. 344, 10 South. 506. It has also been held that if an administrator requests a creditor of the estate to delay suit

and agrees not to take advantage of the three years' statute of limitations, relating to nonresident creditors, and does not waive any other defense, he is not estopped by such agreement, in a suit by such creditor, to interpose as a defense the bar of another statute of limitations of six years: *Maloney v. Wilson*, 9 Baxt. 403; *Loyd v. Loyd*, 9 Baxt. 406.

**b. Oral Agreement.**—It is also well settled that an agreement by the debtor, before the debt is barred, not to plead the statute of limitations, to constitute an estoppel to plead it, need not be in writing. An oral promise by him before the debt is barred, to waive such statute in consideration of a forbearance to sue, is not contrary to public policy, is based upon a sufficient consideration, and constitutes an estoppel to plead the statute of limitations: *Holman v. Omaha etc. Co.*, 117 Iowa, 268, 94 Am. St. Rep. 293, 90 N. W. 833; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481; *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. Rep. 512. In the case of *Holman v. Omaha etc. Co.*, 117 Iowa, 272, 94 Am. St. Rep. 293, 90 N. W. 833, the court said that: "In *Crane v. French*, 38 Miss. 503, the view is expressed that an agreement not to plead the statute of limitations not amounting to an acknowledgment or new promise in writing, within statutory provisions would be contrary to public policy and void, and therefore not effectual to defeat the bar. On the other hand, it has been held in a number of cases that, even though the statute requires an acknowledgment or new promise in such case to be in writing, yet the plea of the statute of limitations will not be allowed where, in view of a parol agreement not to plead the statute, relied on by the other party, the interposition of the defense would be unconscientious and inequitable and would perpetrate a fraud": Citing *State Loan & Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466-600; *Quick v. Corlies*, 39 N. J. L. 11; *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177. Although a statute provides that a new promise to take the case out of the statute of limitations must be in writing and signed by the party sought to be charged therewith, yet when a creditor has delayed action at the request of the debtor, and under his promise, express or implied, to pay the debt and not to plead the statute of limitations, the court in the exercise of its equitable jurisdiction will not permit the debtor to plead the lapse of time, and the creditor may bring his action within the statutory time after such promise and request for delay, although it is not made in writing: *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481. It seems to us, however, that the cases thus declaring defeat or ignore the statute, and the California case sometimes cited does not cover this question for the reason that the promise then relied upon was in writing, executed as prescribed by the statute.



**c. Agreement to Pay Debt.**—A promise to pay a debt, though not in writing, may be made in such a manner that if relied upon by the person to whom made, it may constitute an estoppel against the person making it, to plead the statute of limitations. Thus, in an action for personal injury, plaintiff may meet a defense of limitation by showing that defendant, by promising a settlement, led him to believe that a suit to enforce his claim was unnecessary: *Renackowsky v. Board of Commissioners*, 122 Mich. 613, 81 N. W. 581; or if within the period of limitation after the right of action for a tort accrues, a parol promise is made to pay if suit is not brought, such promise operates by way of estoppel to toll the statute of limitations, and the statute will then run only from the date of such promise: *Armstrong v. Levan*, 109 Pa. St. 177, 1 Atl. 204. Or an agreement by a debtor to apply a certain portion of his crops toward the extinguishment of his debt in consideration of further indulgence will take a case out of the statute of limitations, and may be set up in avoidance of the plea of such statute by way of estoppel upon the debtor: *Randon v. Toby*, 11 How. (U. S.) 493. If pending suit by the insured on his policy of insurance, brought in proper time, the company makes repeated promises to pay the loss, insisting that there is no need of proceeding in the courts to enforce payment, and the same promises are made after the pending suit is dismissed for want of prosecution after being on the docket for more than a year, such declarations and promises are a sufficient excuse for not bringing suit within the period of limitations, or for the nonprosecution of a suit properly commenced and estop the insurance company from setting up the statute as a defense to a suit subsequently brought: *Home Ins. Co. v. Myer*, 93 Ill. 271; and to the same effect, *Voorheis v. People's etc. Soc.*, 91 Mich. 469, 51 N. W. 1110; *Railway etc. Assn. v. Loomis*, 142 Ill. 560, 32 N. E. 424.

If the plaintiff gives the defendant assurance that a matter in controversy between them will be accepted in payment when their mutual accounts shall be settled, and the defendant relies thereon, and desists from suit, the plaintiff, when suing on the mutual account, cannot invoke the statute of limitations against the disputed items: *Missouri Pac. Ry. Co. v. Coombs*, 71 Mo. App. 299. Or if plaintiff and defendant had an understanding that plaintiff should accept defendant's accord in full or partial discharge of the former's claims against the latter upon an adjustment of their accounts, and the defendant, by reason thereof, relied thereon, and did not bring an action on his claim within the statutory limitation, the plaintiff is estopped to invoke the statute in bar of defendant's claim when it is set up as an offset to an action on the plaintiff's account: *Swofford Bros. etc. Co. v. Goss*, 65 Mo. App. 55.

If a promise is made by a surety to a confiding creditor that the debt shall be paid at a time named, which the creditor relies upon,

this is such an "obstruction and hindrance" as is embraced by the statute of limitations, and the time of such obstruction cannot be computed as part of the time of limitation: *Walker v. Sayers*, 5 Bush, 579. If heirs recognize claims as subsisting debts against their ancestor's estate, and the deed of trust by which they are secured as an encumbrance, and induce third persons to take such debts up by agreeing that they are valid liens and will be paid, the heirs are estopped to rely upon the statute of limitations as a bar to such debts: *Lengar v. Hazlewood*, 11 Lea, 539. And to the same effect is *Davis v. Ramage*, 23 Ky. Law Rep. 1420, 65 S. W. 340. If a plaintiff is induced not to commence his suit to recover a claim during the time the matter is pending before referees, by the defendant's agreement to refer, and to abide by and perform the award, the defendant is estopped to plead limitation against such claim: *Davis v. Dyer*, 56 N. H. 143. It has been held, however, that mere declarations made by a trustee that he had so arranged matters that the creditor would get his money, will not, in the absence of fraud, operate by way of estoppel to preclude the trustee from setting up the statute of limitations: *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82. An indorsement on a note in the words, "If not paid, I request indulgence," made by the obligor at or about the time of the execution of the note, is no such continued request as will estop him to plead the statute of limitations as a defense to the note: *Carr v. Robinson*, 8 Bush, 269. The fact that mutual statements of indebtedness between two persons were prepared and exhibited in an attempt at settlement, one of which statements included a note, is not such a promise to pay as to exclude plaintiff in an action on the note from pleading limitation against defendant's exhibited account, set up as an offset: *Campbell v. Park*, 11 Tex. Civ. App. 455, 33 S. W. 754. In North Carolina it is held that a promise to pay in order to estop the defendant from pleading the statute of limitations must be in writing, and a mere request not to sue will not estop the debtor unless there is also an agreement not to plead the statute: *Hill v. Hilliard*, 103 N. C. 34, 9 S. E. 639; *Toms v. Jones*, 127 N. C. 464, 37 S. E. 480.

## II. Fraud.

Many instances occur where fraud on the part of the debtor will estop him from pleading the statute of limitations. Thus, one who, confederating with a trustee, procures by actual fraud the property of the beneficiaries, cannot avail himself of the limitation against their claim: *Bumel v. Stoddard*, Fed. Cas. No. 2135. The defendant may be estopped to plead limitation when there has been a fraudulent concealment by him of the cause of action against him, or, whether the act was fraudulent or not, when the defendant has employed means to mislead the plaintiff, or to hide from him the fact that a cause of action has arisen: *Holloway v. Appelget*, 55 N.

J. Eq. 583, 62 Am. St. Rep. 827, 40 Atl. 27. If an insurance company by fraud or by holding out reasonable hope of an adjustment of a loss, prevents the insured from bringing suit within the period of limitation, it is estopped to set up such limitation as a defense: *Derrick v. Lamar Ins. Co.*, 74 Ill. 405. If a surety has employed fraud to procure the creditor to delay in bringing suit, the time of the delay caused by such fraud must be excluded from the statutory period of limitation when the surety pleads his release under such statute: *Newton v. Carson*, 80 Ky. 309; *Reid v. Hamilton*, 92 Ky. 619, 18 S. W. 770. The statute of limitations is not available as a defense to a purchaser from the alleged owners of land whose conveyance is constructively fraudulent as against the purchaser from another claimant: *Earle v. Peterson*, 67 Ind. 503. The fact that debts secured by an encumbrance on land to which subrogation is sought are barred by limitation will not avail in favor of the debtor or an intervening lienor, where advances have been made on the faith of the debtor's fraudulent representations that the property was unencumbered. Since the debtor is estopped to plead the statute, his legal representative is also estopped: *Union etc. Trust Co. v. Peters*, 72 Miss. 1058, 18 South. 497.

### III. False Representations.

If a defendant intentionally or negligently misleads a plaintiff by his misrepresentations, and causes him to delay suing until the statutory bar has fallen, the defendant will be estopped from pleading the statute of limitations: *Holman v. Omaha etc. Co.*, 117 Iowa, 268, 94 Am. St. Rep. 293, 90 N. W. 833; *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702; *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. Rep. 512. The president of a corporation is estopped to set up the statute of limitations as a defense to an accounting, if the failure of the corporation to sue within the statutory period was due to the defendant's misrepresentation of the corporate affairs: *Coxe v. Huntsville Gas Light Co.*, 106 Ala. 373, 17 South. 626. In an action for false representations as to a boundary in a deed, the defendant, though estopped from denying that he made the representations contained in the deed, is not precluded from showing that plaintiff knew the truth sooner than he claimed, so as to show that his right of action was barred by limitation: *Cade v. Burton*, 45 Ga. 456. In an action by one to recover a portion of a sum of money received by another from a railroad company as compensation for a right of way over a certain tract of land, part of which plaintiff claimed to own, defendant relied upon the statute of limitations as a bar to the action, and it was held that he was not estopped to plead the statute by the fact that he had previously misrepresented to plaintiff, innocently, and without fraudulent intent, the true division line between their lands, so that plaintiff was induced to believe that the right of way did not touch any part of his land, and did

not discover otherwise until after two years from the date of the payment of the money to defendant. In such case plaintiff was as much bound as defendant to know the true boundary line between them, although he resided at a greater distance from it: *McFadden v. Prater* (Tex. Sup.), 3 S. W. 306. Generally, a mutual mistake of the parties does not create an estoppel to plead the statute of limitations: *Moore v. Moore*, 103 Ga. 517, 30 S. E. 535.

#### IV. Subscription to Stock.

The silence of a subscriber for corporate stock after sixteen years, within which time the statute of limitations has run, and his sitting by while large expenditures were being made, does not estop him from pleading the statute against his subscription for the stock: *Pittsburgh etc. R. R. Co. v. Graham*, 2 Grant Cas. 259. In such case no equitable estoppel can arise after limitation has run against an action for a subscription to corporate stock, so as to prevent a subscriber from pleading the statute: *Pittsburgh etc. R. R. Co. v. Graham*, 36 Pa. St. 77.

#### V. Administrators and Heirs.

If an administrator pays part of a claim against an estate and leads the claimant to believe that no resistance will be made to the balance of the claim which he has offered to pay in real estate, he is estopped to plead the statute of limitations to defeat an action on the claim. "He cannot, by his acts and declarations induce the plaintiff to delay proceedings in the case, and then, because of such delay, invoke the statute of limitations to defeat the action": *Wilson v. McElroy*, 83 Iowa, 593-596, 50 N. W. 55.

On the other hand, it has been held that if a testator devises his land to his widow, and she, without taking out letters testamentary, or of administration on his estate, recognizes a debt as valid and subsisting against his estate, and makes partial payments on it, neither she nor her personal representatives are estopped to plead limitation in bar of an action on the debt by the creditor: *Lewis v. Ford*, 67 Ala. 143.

An executor or administrator who unreasonably delays to make objections to a claim against the estate which has been duly presented to him, is not thereby estopped to set up the statute as a bar to the claim: *Bucklin v. Chapin*, 1 Lans. 443. If an administrator has been guilty of fraudulent conduct in making a sale of land of the estate to pay a debt to himself and to others, the sale may be annulled at the suit of other creditors defrauded thereby, and the land resold to pay the intestate's debts, and in such case the heirs and subsequent administrator are estopped to set up the lapse of time occurring between the fraudulent sale and the bringing of such suit by the creditors: *Matthews v. Matthews*, 66 Miss. 239, 6 South. 201.



## VI. Mortgages.

If a person having a mortgage upon a tract of land leaves it with another who has a subsequent mortgage upon the same land, and makes him attorney in fact, with knowledge of such subsequent mortgage, with power to demand, collect, and receive the monthly interest, but without power or instruction to enforce the collection of the mortgage, and without the attorney in fact undertaking the trust of enforcing the collection of the mortgage, and while in the hands of the attorney in fact, the mortgage becomes barred by limitation, the attorney in fact is not guilty of such fraud as estops him, when made a party to a suit afterward brought to foreclose the mortgage, from taking advantage of the statute of limitations to prevent that mortgage from having priority over his subsequent mortgage: *Lent v. Shear*, 26 Cal. 362. But if a mortgage is expressly made subject to a prior mortgage, the junior mortgagee cannot defeat the prior mortgage by pleading that it is barred by limitation: *Park v. Prendergast*, 4 Tex. Civ. App. 566, 23 S. W. 535.

If a person advances money to a mortgagor under and by virtue of his fraudulent representations that his property is unencumbered, and the money so advanced is used to pay off a first mortgage, thus entitling the person advancing the money to subrogation to the rights of the first mortgagee, the mortgagor or his representative cannot invoke the statute of limitations to defeat the first mortgage and thus weaken the security of the person so advancing the money: *Union Trust Co. v. Peters*, 72 Miss. 1058, 18 South. 497. If a deed of trust is foreclosed by an assignee in bankruptcy, the fact that he represented to the maker of the note that he would permit her to redeem on payment of the debt, cannot estop him from setting up the statute of limitations in an action to set aside the sale and to redeem: *Phelan v. O'Brien*, 4 McCrary, 466, 13 Fed. 656.

## VII. Purchases of Land.

If a purchaser of land makes a partial payment therefor, and the seller, though treating the contract as at an end, fails to refund the money paid, his failure to refund keeps the contract open, and he cannot rely upon the statute of limitations to protect him from a decree for the repayment of the money: *Bowles v. Woodson*, 6 Gratt. 78. And a vendee in possession of land under a bond for a deed, who comes into equity twenty-five years after the bond is executed asking for a deed, cannot avail himself of the statute of limitations in reply to a defense set up by the vendor that, although the bond recited payment in full, the purchase money had not all been paid, when the delay in making the deed is due to the vendee's failure to pay: *Encker v. Bently* (Ky.), 2 S. W. 769. If a person enters upon and occupies land under an executory contract to purchase, the statute of limitations does not run against the holder of the legal title so long as such occupant looks to him for a conveyance

thereof: *Hawkins, Writton etc. v. Page*, 4 T. B. Mon. 136. Where a vendor has sold land not belonging to him, and the vendee has withheld so much of the purchase money as will reimburse him for his loss, the contract remaining unexecuted, the vendor is estopped to plead limitations in bar of a bill for injunction brought by the vendee to restrain the collection of the purchase money so withheld: *Ransom v. Shuler*, 8 Ired. Eq. 304. Defendant, in a suit for specific performance of an agreement to convey land according to the conditions of a title bond reciting payment of the consideration, filed a cross-complaint contradicting such recital and demanding the purchase money, and it was held that plaintiff was estopped to set up by reply the statute of limitations as a bar to the demand, as such bar was waived by relying on the contract: *Hamilton v. Plant*, 81 Ind. 417.

### VIII. Individual Instances of Estoppel.

Quite a number of cases incapable of any logical classification exist which involve the question of an estoppel to plead the statute of limitations. The substance of such cases is herewith appended. If, on the trial of a case, the defendant gives in evidence state demands on his part and insists upon their being allowed to go to the jury, he is estopped to set up the statute of limitations against similar demands on the part of the plaintiff, where the claims on both sides are matters of book account: *Gulick v. Princeton etc. Turnpike Co.*, 14 N. J. L. 545.

Defendant, by filing an admission of plaintiff's case, in order to obtain the right to open and close, is not thereby estopped from setting up in defense the statute of limitations: *Emmons v. Hayward*, 11 Cush. 48. And a defendant is not precluded from availing himself of the benefit of the statute of limitations by a remark of his counsel in argument, "that his client would scorn to take advantage of the statute" in a certain event: *Steele v. Jennings*, 1 McMull. 297. But if a judgment defendant has enjoined the enforcement of the judgment by unfounded litigation until it has been barred by limitation, both he and his sureties are estopped to take advantage of the statute: *Davis v. Hoopes*, 33 Miss. 173.

One who procures an adjudication that an action against him upon a note was prematurely brought, on the ground that the note was not due until after a designated day, which had not arrived before the filing of plaintiff's petition, is estopped from setting up the statute of limitations in defense to a second action on the same note brought after the dismissal of the first, and within the statutory period from the so-claimed maturity of the note: *Gentry v. Barron*, 109 Ga. 172, 34 S. E. 349.

A person is generally estopped to escape the consequences of his own negligence by pleading the statute of limitations as a defense: *Talmadge v. Renssalarrr etc. R. R. Co.*, 13 Barb. 493. Hence, if a

county negligently misappropriates the county school fund, it cannot set up limitation as a defense to an action to recover such fund: *Board of Commissioners v. State*, 106 Ind. 531, 7 N. E. 254.

The receipt of an account by a debtor without objection makes it *prima facie* evidence of the claim, but it does not, without more, estop him from pleading the statute of limitations: *Verrier v. Gullion*, 97 Pa. St. 62.

An indorser on a note may set up limitation, although he has pleaded payments since the statute began to run, the payments not having been made or ratified by him: *McMullan v. Rafferty*, 69 N. Y. 456.

If a debtor, by his conduct, has led his creditor to believe that a payment made by him to a stranger at the creditor's request, was intended as a payment on the debt which would stop the running of the statute of limitations, and the creditor was thereby induced to act upon that belief, the debtor is estopped to insist that the payment was not so intended, or to rely upon the limitation as a defense thereto: *Chase v. Carney*, 60 Ark. 491, 31 S. W. 43.

A person cannot be debarred by an equitable estoppel from availing himself in a court of law of the statute of limitations: *Bank of Waterman v. Waterman*, 26 Conn. 324.

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## UNITED STATES CASUALTY COMPANY v. BAGLEY.

[129 Mich. 70, 87 N. W. 1044.]

**NEGLIGENCE—Right of Assignee to Recover for.**—If a tenant, under the terms of a policy of insurance, on payment of his loss thereunder caused by the negligence of his landlord, assigns his claim to the insurer, the negligence of the latter in assuming the risk under the policy is no defense in an action by him against the landlord to recover for the latter's negligence. (p. 425.)

Action to recover for the negligence of a landlord in the construction of a sprinkler system on premises leased to plaintiff's assignors, *Burnham Stoebel & Company*. Judgment for plaintiff. Defendants appealed.

Wells, Angell, Boynton & McMillan, for the appellants.

Brennan, Donnelly & Van De Mark and A. Lucking, for the appellee.

**72 MONTGOMERY, C. J.** The defendants contend that there was testimony which would justify a finding by the jury

that plaintiff was guilty of negligence in insuring the risk, and that it should be held that, if it was guilty of such negligence, there can be no recovery against the defendants. The difficulty we find in assenting to this contention lies in the fact that there were no relations whatever between the plaintiff and the defendants which imposed any duty upon the plaintiff to refrain from making any contract to indemnify Burnham, Stoepel & Co., which, in the judgments of its agents, was advantageous. Negligence of which a party has a right to complain is the omission of some duty owing to the complaining party: See 1 Thompson on Negligence, sec. 3. It cannot be doubted that, had Burnham, Stoepel & Co. brought this action against the defendants, their right of recovery would be clear. Nor would the fact that they had taken out this insurance with the plaintiff have defeated that recovery: *Perrott v. Shearer*, 17 Mich. 48; *Peter v. Chicago etc. R. R. Co.*, 121 Mich. 324, 80 Am. St. Rep. 500, 80 N. W. 295. This being so, it can work no injury to the defendants that, either before or after the injury resulting from their negligence, the plaintiff has been subrogated to the right of action which would otherwise be clear in Burnham, Stoepel & Co. When the insurance company accepted this risk, its own inspection <sup>73</sup> would, as between Burnham, Stoepel & Co. and plaintiff, estop it from denying that it had made sufficient examination, and, if it found the risk more than ordinarily dangerous, we know of no rule of law which would prohibit the company from accepting the risk and writing the policy. Indeed, it may have increased its premium by reason of the danger being unusual because of the situation of the premises. If, in accepting such a risk, it took greater risks than it should, it may have been guilty of a breach of duty to its stockholders, but it neglected no precaution owing to a stranger: See, for their bearing on this question, *Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co.*, 17 Fed. 919, and *Insurance Co. v. The C. D. Jr.*, 1 Woods, 72, Fed. Cas. No. 7051.

Defendants' counsel insist that the fact that plaintiff claims by subrogation under Burnham, Stoepel & Co. does not preclude defendants from insisting upon the defense of negligence. It is to be kept in mind that it is only because plaintiff is subrogated to Burnham, Stoepel & Co.'s rights, in place of the action being brought by that firm, that the defense is attempted; and it leads back to the question whether the plaintiff owed the defendants any duty of inspection.



The defendants rely upon the rule that, where one meets a loss through his own negligence, he will not be permitted to invoke the doctrine of subrogation. The answer to this was tersely made on the argument—that in this case it is not an attempt to invoke the equitable doctrine of subrogation, but that the plaintiff is already subrogated to the rights of Burnham, Stoepel & Co. What it is now seeking to do is to recover in that right under what amounts to an assignment of Burnham, Stoepel & Co.'s claim, and the case presented is the case of Burnham, Stoepel & Co., represented by the plaintiff, who might have sued either in its own name or in that of Burnham, Stoepel & Co., at its election.

The defendants contend that this right to maintain the action should be subject to an exception, which is formulated by defendants' counsel as follows:

74 "One whose own neglect or wrong has been a cause contributing to the damage sustained by him cannot successfully invoke the right of subrogation."

But we think no such exception can have application to this case: 1. Because the plaintiff has been guilty of no neglect or wrong as against the defendants; and 2. The damage which resulted to the plaintiff from its own inattention was whatever excess it paid to Burnham, Stoepel & Co. over and above the value of the right of subrogation contracted for in the policy, if anything. The circuit judge correctly charged the jury that the plaintiff was entitled to the same rights that Burnham, Stoepel & Co. would have had had the action been brought in their name.

The judgment will be affirmed.

The other justices concurred.

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*The Negligent Destruction of property may be recovered for against the wrongdoer notwithstanding the loss is protected by insurance: Lake Erie etc. R. R. Co. v. Griffin, 8 Ind. App. 47, 52 Am. St. Rep. 465, 35 N. E. 396; Peter v. Chicago etc. R. R. Co., 121 Mich. 324, 80 Am. St. Rep. 500, 80 N. W. 295. An insurer, after paying a loss incurred by the assured, is generally subrogated to all the rights of the latter against the person whose tortious act caused the loss: Mobile Ins. Co. v. Columbia etc. R. R. Co., 41 S. E. 408, 44 Am. St. Rep. 725, 19 S. E. 858; Packham v. German Fire Ins. Co., 91 Md. 515, 80 Am. & N. E. Rep. 461, 46 Atl. 1066.*

## BOWEN v. LANSING.

[129 Mich. 117, 88 N. W. 384.]

**VENDOR AND VENDEE—Contract to Purchase—Death of Vendor—Interest of Heir—Execution.**—On the death of a vendor, his interest in land held by his vendee under a contract to purchase goes to his administrator as personalty, and cannot be sold under execution against his heir. (p. 430.)

Bowen, Douglas & Whiting, for the appellant.

J. H. Patterson, Clark, Durfee & Allor, for the appellees.

**117** HOOKER, J. Angus Keith, an incompetent person, being possessed of certain land upon Grösse Isle, contracted by an ordinary land contract, through his legally appointed guardian, the Union Trust Company, to convey it to Lulu D. Wormer. The purchase price was two thousand five hundred dollars, five hundred dollars of which was paid at the time the contract was made. Before full payment, but after a part of the purchase money had been paid, and after the vendee had been put in possession under the contract (according to complainant's claim), Mr. Keith died, leaving as his sole heir his son, A. Douglas Keith. The complainant, Bowen, was appointed administrator of Keith's estate, which consisted of fifty dollars worth of household property and his interest in the land contracted to Wormer. Claims aggregating four hundred dollars or **118** five hundred dollars have been presented, and the administrator has no means with which to pay them, aside from the money due or to become due upon Wormer's contract, amounting to upward of two thousand dollars.

Angus Keith died on January 24, 1899, and on the seventh day of February, 1899, defendant Lansing, a judgment creditor of A. Douglas Keith, caused his codefendant, Stewart, a sheriff, to levy a writ of fieri facias in favor of Lansing upon the interest of said A. Douglas Keith in said premises, and to advertise the same for sale. This was about a month previous to complainant's appointment as administrator. After said levy the administrator filed this bill to remove the cloud from the title caused by defendant's levy, alleging the foregoing facts, and that Wormer was ready to pay the purchase money when she could obtain a clear title to the premises, but refused payment until this cloud should be removed. Subsequently defendant Lansing purchased the premises at the sheriff's sale.

Counsel seem to agree that the only question raised is whether the interest of Angus Keith in this land descended to A. Douglas Keith, so as to be subject to a levy. Complainant contends that it is personal property, and therefore belongs to the administrator, and that it was not subject to such levy. Defendants maintain that it is an interest in lands, which descended to the heir, by operation of law, upon the death of the ancestor, subject to the rights of creditors, and that it was susceptible to a levy for the debts of the heir, subject to such rights as creditors may have.

When we shall have determined the character of the interest remaining in a vendor of land held by the vendee upon contract of purchase merely, we shall have gone far in ascertaining whether it is such as will descend to the heir as real estate, or go to the administrator as personalty. In the early case of *Wing v. McDowell*, Walk. Ch. 181, it was said: <sup>119</sup> "At law a contract for the purchase of land gives the vendee no interest in the land; but the rule is otherwise in equity, which considers the vendor, as to the land, a trustee for the purchaser, and the vendee, as to the money, a trustee for the seller. In equity the land belongs to the vendee, and may be sold, devised, or encumbered by him, and on his death will descend to his heirs: *Seton v. Slade*, 7 Ves. 265, 274; *Paine v. Meller*, 6 Ves. 353; *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 343. It must be taken, however, subject to the rights of the vendor under the contract. And, McDowell having an equitable interest in the land under the contract, the mortgage from him to Simmons was an equitable mortgage of that equitable interest."

This was emphasized by *Fitzhugh v. Maxwell*, 34 Mich. 138, where it was again said that the legal title remained in the vendor as a trust, and that his only equitable claim upon it was by way of security for his debt in the nature of a vendor's lien, which could only be made effective to divest the vendee's equitable title by a sale through proceedings to foreclose the vendor's lien. In *Walker v. Casgrain*, 101 Mich. 608, 60 N. W. 292, it was said: "While complainant holds the legal title, defendant Casgrain is the owner in equity. The claim of the vendor is but an ordinary money debt, secured by the contract." See, also, *Corey v. Smalley*, 106 Mich. 260, 58 Am. St. Rep. 474, 64 N. W. 13; *O'Brien v. Evans*, 107 Mich. 623, 65 N. W. 571.

Many authorities are cited by counsel for the complainant in support of their contention that a vendor's interest is not real

estate, and does not pass to the heir, but is personalty, and goes to the administrator. The rule is so stated in 11 American and English Encyclopedia of Law, second edition, 843, where the authorities are collected, representing the states of Arkansas, Indiana, Massachusetts, New York, Pennsylvania, Illinois, and Wisconsin. See, also, Warvelle on Vendors, 189, and authorities cited; Sugden on Vendors and Purchasers, marg. p. 177. In *Scott v. Davis*, 141 Mo. 226, 42 S. W. 717, the court quotes with approval from 22 American and English Encyclopedia of Law, 1064, the following language, viz.:

120 "The personal representative of the vendor is generally the proper party to enforce specific performance when the purchase money is unpaid, after the death of the vendor, although, if a conveyance has to be made, the vendor's heirs or devisees may also be necessary parties"—citing *Pomeroy on Contracts*, sec. 494; *Fry on Specific Performance of Contracts*, 3d ed., etc. 190; *Perry v. Roberts*, 23 Mo. 221; *Leeper v. Lyon*, 63 Mo. 216; *Butler v. Rockwell*, 14 Colo. 125, 23 Pac. 462; *Hill v. Proctor*, 10 W. Va. 59; *Angell v. Steere*, 16 R. I. 200, 14 Atl. 81; *Potter v. Ellice*, 48 N. Y. 323.

As the foregoing authorities indicate that the vendor's title is only a trust coupled with an interest by way of security for a debt, which is personalty, so the following (cited by counsel) are in harmony in holding that the vendee is the cestui que trust as to the legal title, and that his interest is real property, and descends to his heirs (in equity), who are the proper ones to file a bill for specific performance: *Champion v. Brown*, 6 Johns. Ch. 400, 10 Am. Dec. 343; *Pomeroy on Contracts*, sec. 494; *Lavender v. Abbott*, 30 Ark. 172; *Palmer v. Morrison*, 104 N. Y. 132, 10 N. E. 144; *Bender v. Luckenbach*, 162 Pa. St. 22, 29 Atl. 295; *Sutter v. Ling*, 25 Pa. St. 466; *Miller v. Miller*, 25 N. J. Eq. 354; *Skinner v. Newberry*, 51 Ill. 203; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Smith v. Gage*, 41 Barb. 60; *Potter v. Ellice*, 48 N. Y. 323; *Denham v. Cornell*, 67 N. Y. 556; *Compo v. Jackson Iron Co.*, 49 Mich. 44, 12 N. W. 901; *House v. Dexter*, 9 Mich. 246; *Baxter v. Robinson*, 11 Mich. 522; *Gustin v. School District*, 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361.

It is clear that, upon the death of the vendor, the chose in action, with the security represented by the contract, became a part of the personal assets of the estate, and the interest of A. Douglas Keith therein was prospective merely, and contingent upon the course of administration. If the legal title descended



to him, he held it merely by a tenure analogous to that of a "dry trustee," for such person as should become entitled to it by payment of the contract price, or by purchase upon foreclosure of the lien; <sup>121</sup> and he had no interest that could be acquired by sale on execution: *Battle v. Petway*, 27 N. C. 576, 44 Am. Dec. 59; *Boardman v. Willard*, 73 Iowa, 20, 34 N. W. 487; *Robinson v. Chapline*, 9 Iowa, 91; *Hollingsworth v. Trueblood*, 59 Ind. 542; *Cox v. Arnsmann*, 76 Ind. 210; *Bostick v. Keizer*, 4 J. J. Marsh. 597, 20 Am. Dec. 237; *Williams v. Fullerton*, 20 Vt. 346; *Townsley v. Barber*, 27 Vt. 417; *Rankin v. Barcroft*, 114 Ill. 441, 3 N. E. 97; *Campfield v. Johnson*, 5 N. J. Eq. 245. We are of the opinion that the execution debtor, A. Douglas Keith, had no interest in the land subject to sale on execution, and that the purchaser took no title by his purchase at such sale.

The decree of the circuit court will be reversed, and complainant may take a decree in accordance with the prayer of his bill, with costs of both courts.

The other justices concurred.

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*For Authorities Bearing on the Doctrine of the principal case, see Davis v. Williams, 130 Ala. 530, 89 Am. St. Rep. 55, 30 South. 488; Gustin v. Union School Dist., 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; Smith v. Phoenix Ins. Co., 91 Cal. 323, 25 Am. St. Rep. 191, 27 Pac. 738; Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Champion v. Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343. The interest of a vendor who has made a contract of sale and received part of the purchase money is not subject to execution: Burke v. Johnson, 37 Kan. 337, 1 Am. St. Rep. 252, 15 Pac. 204; Jones v. Howard, 142 Mo. 117, 64 Am. St. Rep. 546, 43 S. W. 635. And it is said in Skinner & Sons etc. Co. v. Houghton, 92 Md. 68, 84 Am. St. Rep. 485, 488, 48 Atl. 85, that after a contract of sale, the vendor's interest is not real estate, and in case of his death the unpaid purchase money is personal property which goes to his personal representatives.*

## HAMMEL v. FIRST NATIONAL BANK OF HANCOCK.

[129 Mich. 176, 88 N. W. 397.]

**CHATTEL MORTGAGES—Priority.**—If a purchase of chattels and the giving of a mortgage thereon for the purchase price are concurrent and constitute a single transaction, such mortgage takes precedence over a prior chattel mortgage covering the purchaser's after-acquired property. (p. 432.)

Dunstan & Hanchette, for the appellant.

Gray, Haire & Rice, for the appellee.

**176** MOORE, J. The plaintiff obtained a judgment in the court below. The defendant has brought the case here as a case made.

In December, 1896, one Eliassen was indebted to the defendant, and upon that day gave it a chattel mortgage, covering all horses, wagons, sleighs, harnesses, etc., belonging to him; also all that might thereafter belong to him. The mortgage was duly recorded on the day given, with the town clerk of the proper township, and kept properly renewed. In January, 1901, the First National Bank of Hancock foreclosed the mortgage, took possession of all the chattels therein mentioned, and sold the same at public auction. November 16, 1900, Mr. Eliassen bought of the plaintiff three horses, and, at the same time, gave a chattel mortgage upon them and other personal property for the purchase price of said horses, which chattel mortgage **177** was at once duly filed. Later the defendant foreclosed its mortgage, seizing and selling the three horses sold by Hammel to Eliassen. Hammel then sued the bank in trover and recovered a judgment.

The sole question involved is, Which of these mortgages has priority? It is claimed by defendant that the record of the chattel mortgage is due notice to all who deal with the mortgagor as regards future-acquired property, citing *Eddy v. McCall*, 71 Mich. 503, 39 N. W. 734, and that this case is controlling in its favor. We cannot assent to this position. The sale by Hammel to Eliassen, and the giving of the chattel mortgage, were concurrent. They formed one transaction. Eliassen obtained no title freed from a lien. The only title he had was subject to the lien. It was not intended to give him any other title, and he did not expect to receive any other. We cannot express the rule of law which controls the case better than to

quote from the opinion of Justice Bradley in *United States v. New Orleans R. R. Co.*, 12 Wall. 362, which reads, in part, as follows: "The appellants contend, in the next place, that the decision upon the facts was erroneous; that the mortgages, being prior in date to the bond given for the purchase money of these locomotives and cars, and being expressly made to include after-acquired property, attached to the property as soon as it was purchased, and displaced any junior lien. This, we apprehend, is an erroneous view of the doctrine by which after-acquired property is made to serve the uses of a mortgage. That doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and, if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending <sup>178</sup> over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money."

Judgment is affirmed.

Montgomery, C. J., Hooker and Long, JJ., concurred.

Grant, J., did not sit.

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*Chattel Mortgages* on after-acquired property, as affecting the rights of subsequent purchasers and encumbrancers, are considered in the monographic notes to *Gregg v. Sanford*, 76 Am. Dec. 723-733; *Moody v. Wright*, 46 Am. Dec. 712-718; and the subsequent cases of *Ferguson v. Wilson*, 122 Mich. 97, 80 N. W. 1006, 80 Am. St. Rep. 543, and cases cited in the cross-reference note thereto; *First Nat. Bank v. Lindenstruth*, 79 Md. 136, 47 Am. St. Rep. 366, 28 Atl. 807.

## JONES v. GREEN.

[129 Mich. 203, 88 N. W. 1047.]

**CORPORATIONS—Stock—Validity of Transfer.**—A stockholder in a corporation may obtain control of a majority of the stock therein by purchase, and the validity of the transfer does not depend on the motive of the purchaser or his purpose in acquiring it. (p. 436.)

**CORPORATIONS—Stock—Voting Power.**—Corporate stock standing in the name of an administrator may be voted by him, in electing directors, as against those holding a beneficiary interest therein. (p. 436.)

**CORPORATIONS—Contracts with Stockholders—Fraud.**—A contract between a corporation and a stockholder therein, entered into through directors to whom he has assigned stock in order to make them eligible as directors, is in effect a contract by the stockholder with himself, and if made for the purpose of producing a profit for him, is a fraud upon the corporation and void. (p. 436.)

**CORPORATIONS—Contracts with Stockholders—Setting Aside—Return of Benefits.**—If the directors of a corporation, with the concurrence of a majority of its stockholders, agree that one stockholder shall expend a certain sum of money in the development of the corporate property, and in return therefor shall receive a certain amount of stock, and such contract is declared void and the transfer of stock is set aside, equity requires that such stockholder shall be reimbursed for all money expended by him bona fide under the contract, but his lien for money thus expended by him should be limited to the stock delivered to him, and he is not entitled to a lien on the corporate property itself for such expenditures. (p. 437.)

H. D. Smith and Lyle & Eby, for the appellants.

M. L. Howell, for the appellees.

**204** HOOKER, J. At some time earlier than June, 1887, one Jesse G. Jones and a number of other persons purchased a mining claim in Colorado. Jesse G. Jones died subsequently, leaving a widow, Elizabeth H. Jones, and four minor children. On June 20, 1887, a patent for the land issued from the federal government to the parties interested, including Elizabeth H. Jones and "the heirs of Jesse G. Jones." On April 3, 1888, the grantees incorporated the Roscoe Conkling Gold Mining Company under the laws of Colorado, with a capital stock of ten thousand shares, of the par value of ten dollars per share, defendant Eli Green being employed to take the necessary steps to organize the company. Six thousand shares were distributed among the shareholders in consideration of a deed of the mine, which the shareholders joined in making. Elizabeth H. Jones attempted to convey the interest of the **205** estate of



Jesse G. Jones as his administratrix, and shares of stock were allotted to her, as such administratrix, in payment for the deed. Four thousand shares of stock were withheld from sale as a working capital for the new company, and apparently there were no other means provided for the development of the prospective mine. A contract was made between the corporation and Eli Green, wherein he undertook to sell five hundred shares of stock at par within a prescribed period, for which service he was to receive two thousand shares of the stock. Thus the company provided for the sale of two thousand five hundred shares for five thousand dollars, or two dollars per share.

The affairs of the corporation did not prosper, and it ran along until 1891, when a difference of opinion as to the policy to be pursued seems to have arisen. As stated, Eli Green, who was an uncle to Elizabeth H. Jones, had been employed to organize the company and negotiate stock, and perhaps to render some service at the mine; and Mrs. Jones, who, in her own right, and as administratrix, had possession of a large quantity of the stock, was desirous that the company should enter into a contract with said Eli Green to develop the mine. Negotiations followed between Green and the board of directors, but they could not agree upon terms, and some of the members of the board had negotiations with others. The matter culminated in a strife for the control of the company's board of directors in 1891, when, by a majority of votes as cast, Mrs. Jones was elected president, and directors friendly to her policy were chosen, and immediately thereafter a board meeting was held, and a written contract was made with Eli Green, by which it was agreed, in substance, that he should expend money in developing the mine to the amount of four thousand dollars, and that in return therefor two thousand four hundred shares of the stock should be delivered to him from the treasury or working stock, the same being deposited with a local banker in Cass county for that purpose. Subsequently, upon an alleged showing that the expenditure had been made, the board caused the shares to be delivered to Eli Green.

**206** The bill in the cause is filed by two of the children of Jesse G. and Elizabeth H. Jones. Eli Green and his wife, Esther, the other two heirs of Jesse G. Jones, the Roscoe Conkling Gold Mining Company, and one George Gard (who was elected secretary of the company in 1891) were made parties defendant. The bill is filed to set aside the transfer of stock to Eli Green, and from him to his wife, Esther, as fraudulent,

and for a determination of complainants' rights in the stock, and for other relief. Elizabeth H. Jones and Eli and Esther Green join in an answer, denying generally the claims of the bill. An answer purporting to be filed by the company through its alleged secretary and treasurer was filed. These alleged officers were stockholders who were in sympathy with, and claim to have been elected by, the opposition to Mrs. Jones, at the annual meeting in 1891, and they are apparently in sympathy with the complainants, as their answer indicates.

Upon the hearing it was made to appear that Eli Green and Elizabeth H. Jones colluded to secure control of the board, in order that they might carry out the proposed policy of making the contract mentioned. To accomplish this, she, at the suggestion of Green pushed a claim in behalf of her husband's estate against one Finney Jones, and finally secured a block of stock held by him in settlement of it, which gave her the necessary majority. Under the advice of Eli Green she was careful to conceal her motive, lest those opposed to her should prevent her from acquiring the stock. He was at the time the president of the concern, and would not sign the new certificate, which Elizabeth, as vice-president, then signed, at Eli Green's suggestion. The letters written by Green to her, of which there are many, show plainly the concert of action between him and her to make the proposed contract. To obtain the necessary stockholders for officers and directors, Green assigned stock in nominal amounts and the program was fully carried out. The learned circuit judge found this transfer of stock fraudulent, and made a decree setting aside the transfer to Green, but giving him a lien on all <sup>207</sup> of the property of the company for the sum of four thousand dollars, with interest at five per cent from July 1, 1899, which amount was found to be due to Green. The complainants, Green, and the mining company have appealed.

The record shows that the directors who made the contract were elected by a majority of the stock. It was competent for Mrs. Jones to obtain control of a majority of the stock by purchase, and the validity of the transfer does not depend on her motive or purpose, and, having obtained it, she was entitled to vote it. The stock that complainants claim was in her name, and, as between herself and other stockholders, she had the right to vote it. Complainants, who were not stockholders, had no power in the premises. The election of the directors was valid.

It appears that the holders of a majority of the stock approved the proposed contract with Eli Green, as the minority stockholders well knew. The directors were elected with the understanding on the part of all that they would carry out the wishes of the majority. The court found that a fraud was attempted upon the part of Green, and he may have taken the view that a contract made through directors who held Green's stock was a contract made by Green with himself, and, if designed to produce a profit, was a fraud upon the company; and we think this is the rule. He was to receive twenty-four thousand dollars worth of stock on a basis of the par value for four thousand dollars in money. We do not feel confident that this stock was worth four thousand dollars, but it is not important here. All of the stockholders wanted the mine developed. The minority attempted to elect a board, and an attempt was made to make a contract with another; but this was unauthorized, and not binding upon the company. The only lawful board assumed to make a contract for the company. This was with full concurrence of the holders of a majority of the stock. If, under that contract, Green in good faith expended four thousand dollars for the benefit of the company, in accordance with the contract, in the development of the mine, there would seem to be <sup>208</sup> no reason why equity does not require that he be reimbursed. It is impossible to determine satisfactorily whether this amount was so expended. He testified that it was, and there is no tangible and convincing proof to the contrary. We might perhaps infer that the money could have been spent more judiciously, but that is not clear. The trial judge, who saw the witnesses, seems to have believed that such expenditure was made, and we do not feel justified in holding otherwise.

It is contended that the court erred in making the sum found due Green a lien upon the mine, and providing for a sale of the same in case his claim should not be paid. We are of the opinion that the defendant Green should be limited in his lien to the two thousand four hundred shares. They have already been delivered to him. A majority of the stockholders, who have been willing to contract on the basis of two thousand four hundred shares, are willing that he should have them, and, as against them, he is not equitably entitled to more; while, as to the minority, he has been limited to a recovery of the amount expended, which they assert to be less than the value of two thousand four hundred shares. We see no reason for his being entitled to more than his contract price, even if the two thousand

four hundred shares are worth less, and even against those who question the validity of his contract.

The stock which Mrs. Jones received for and on behalf of her husband's estate, whether received in payment for his interest in the land or from Finney Jones in satisfaction of the debt due the estate, should be treated as property held in trust for herself and the heirs. The record shows that the estate has been settled, and that she has been discharged as administratrix, so that it may be assumed that creditors have no interest in this stock. As all the parties are before the court, the only minor being represented by guardian ad litem, this court may properly adjust the rights of all in this decree by requiring that Elizabeth H. Jones convey to each his proper share of the stock.

A decree may be taken adjudging that the stock issued <sup>209</sup> in pursuance of the contract be surrendered for cancellation upon payment by the company, or upon its behalf, of the sum of four thousand dollars, with interest thereon at five per cent from July 1, 1899, to the said Eli Green, within the period of six months after settlement and notice of the decree herein provided for, otherwise the same to be and remain the property of said Eli Green; that the stock issued to said Elizabeth H. Jones, as administratrix, is held by her in trust for herself and the four children of herself and Jesse G. Jones, and that she assign by apt and proper writing to each his or her proportionate share, the same to be settled at the time of settling the decree in this cause, or by a reference, if the same shall then be found necessary, unless the parties can agree thereto. The complainants will recover costs of both courts against Eli Green, Esther Green, and Elizabeth H. Jones.

Montgomery, C. J., Moore and Grant, JJ., concurred.

Long, J., took no part in the decision.

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*Corporations.*—The executors of an estate have the right to vote the corporate stock of their ancestor: *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929. And an assignee of stock, who appears as stockholder on the corporate books, is qualified to vote the stock and hold the office of director, although the transfer was made for the sole purpose of so qualifying him: *In re Argus Printing Co.*, 1 N. Dak. 435, 26 Am. St. Rep. 639, 48 N. W. 347. That one stockholder may own a majority of the stock in the corporation, see *Durlacher v. Frazer*, 8 Wyo. 58, 80 Am. St. Rep. 918, 55 Pac. 306; *In re Argus Printing Co.*, 1 N. Dak. 435, 26 Am. St. Rep. 639, 48 N. W. 347. But it is illegal and fraudulent for a majority stockholder to purchase the property of the corporation at a sale authorized by himself: *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667.



## KOONS v. VAUCONSANT.

[129 Mich. 260, 88 N. W. 630.]

**LIMITATION OF ACTIONS—Joint Debtors—Renewal Note.** The giving of a renewal note by a joint maker does not keep the debt alive as to comaker. (p. 439.)

**LIMITATION OF ACTIONS—Joint Debtors—Renewal Note—Fraud.**—The giving of a renewal note by a joint maker and his signing of the comaker's name thereto without authority, thereby misleading the payor does not work an estoppel against such comaker not signing, nor keep the debt alive as to him. (p. 439.)

**LIMITATION OF ACTIONS—New Promise.—Moral Obligation** to pay a debt barred by limitation is a sufficient consideration for a new promise to pay it. (p. 439.)

**MORTGAGES — Consideration — Compounding Felony.**— A mortgage executed to prevent a prosecution for a felony is void for illegality of consideration, although there is in fact no felony to be compounded. (p. 440.)

Spaulding, Norton & Dooling, for the appellant.

H. E. Walridge and E. H. Lyon, for the appellee.

**261** HOOKER, C. J. The complainants pray a decree discharging a mortgage given by them under alleged duress. Their claim is that on January 2, 1900, defendant's son and his lawyer called at the home of the complainants, and presented a note, which purported to bear the signature of their son, E. S. Koons, and his father, Solomon D. Koons, one of the complainants, which note bore date November 27, 1896. Solomon stated to them that they had made such a note in 1892, but that he had not made a second note; that his signature was not upon the note presented, nor had he ever authorized anyone to sign his name to it. It is claimed that the lawyer said that their son, E. S. Koons, must have signed it, and that, unless complainants gave a mortgage upon their farm to secure defendant, their son would be arrested. Complainants requested a little time to investigate, but this was denied, and the mortgage was made. A day or two later this bill was filed. The defendant's counsel question the accuracy of this statement, but do not deny that the first note was given, being dated in 1892, in payment for an interest in a stock of goods bought by the younger Koons from one Sullivan, who was payee in that note. It is not disputed that an interview was had and the mortgage made at the time and place alleged, but it is denied that it was obtained by threats of arrest or duress of any character.

We are convinced that the one thousand dollar note originally given was never renewed by the complainant S. D. Koons, and that action upon it was barred by the statute of limitations before the mortgage in controversy was given. The note defendant's exhibit "A" was the last of several consecutive renewals of that note, but complainant's name was written upon it by his son, without his authority. While this took the debt out of the statute as to the son, it could not have that effect upon the complainant, because he was not a party to the fraud upon the payee. He has done nothing that should estop him from pleading the statute, although his principal may have done so: *Probate Judge v. Stevenson*, 55 Mich. 320, 21 N. W. 348; *Rogers v. Anderson*, <sup>262</sup> 40 Mich. 290; *Sweet v. Ellis*, 109 Mich. 460, 67 N. W. 535; *Home Life Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334; 19 Am. & Eng. Ency. of Law, 2d ed., p. 309, and note 2; (as to fraud of agent) p. 249, and note 4; *Stevenson v. Robinson*, 39 Mich. 160. Undoubtedly, a new promise made by the complainant would be valid, so far as consideration is concerned, because of his moral obligation, notwithstanding the lapse of more than six years. But he was under no legal obligation to renew his note, and certainly he was under no legal duty to secure it. The moral obligation did not enter into the contract. He refused to recognize that, and denied his liability; and the proof is convincing that he and his wife were moved to execute the mortgage reluctantly, and through the fear of danger to their son, and hope to prevent his prosecution for the criminal offense of forgery. The defendant's agent and attorney called upon complainants for the purpose of getting security. During that interview—it matters not how—the subject of the forgery was introduced, and the complainants' fears became aroused. Defendant's witnesses say they were not responsible for that, for they made no threats of arrest nor promises of immunity, and that S. D. Koons himself suggested that the note was a forgery, and that the person who perpetrated it ought to be prosecuted. Counsel say that they did not suggest that this was a forgery, for they entertained a different theory about the note. If this be conceded, the fact remains that they availed themselves of the persuasive influence of the fear of prosecution of the son felt by his parents. They refused to give an opportunity for the complainants to investigate and ascertain the truth about the matter, and we do not doubt that it was intended that they should understand that the giving of security would prevent prosecution, and that it was

the only way that it could be prevented. The arrangement, then, was to all intents and purposes an agreement to compound an alleged felony. It may be said that they thought there was no forgery, and perhaps there was none, and that, therefore, no felony was <sup>263</sup> really compounded; but one cannot obtain a promise upon a threat to accuse of a felony, and afterward avoid the consequences and make the consideration legal by showing that there was no felony committed as a matter of fact. If the minds of these parties met upon the consideration, it was that there should be no prosecution for a crime which both understood defendant's representatives to assert. There is some confusion on the subject of duress, and it may be due in part to the unnecessary attempt to invalidate such contracts as this upon the ground of duress. It is evident that there are few husbands, wives, parents, or children who would not make a heavy sacrifice to avert punishment to their immediate relatives, and this is so natural that few blame them. Yet the law punishes those who compound a felony. As a consideration for an undertaking, a promise not to prosecute a felony is illegal and void. No other consideration appears here. The moral obligation would, perhaps, support a promise, if it entered into the transaction. There is not only no evidence that it did, but the clearest evidence that it did not. It is right that men should pay their debts, and not culpable for creditors to collect by legitimate means and methods; but making merchandise of the criminal law is not a lawful method.

We concur with the learned circuit judge in his disposal of the case.

The decree is affirmed, with costs.

Moore, Grant, and Montgomery, JJ., concurred.

Long, J., did not sit.

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*One Joint Debtor* cannot, after the bar of the statute of limitations has attached to the joint debt, by part payment or acknowledgment, remove the bar as to the others: See the monographic note to *Maddox v. Duncan*, 65 Am. St. Rep. 685-687. For contrary authority, see the note to *Beitz v. Fuller*, 10 Am. Dec. 695-697.

*The Consideration for a Promise* to pay a debt barred by the statute of limitations is discussed in the monographic note to *Ferguson v. Harris*, 39 Am. St. Rep. 739, 740.

*A Contract is Wholly Void* if any part of the consideration is the suppressing of a criminal prosecution: See the monographic note to *Town of Hinesburgh v. Sumner*, 31 Am. Dec. 600-604; *Mack v. Campeau*, 69 Vt. 558, 60 Am. St. Rep. 948, 38 Atl. 149.

**McCAUGHNA v. OWOSSO AND CORUNNA ELECTRIC COMPANY.**

[129 Mich. 407, 89 N. W. 73.]

**NEGLIGENCE—Dangerous Premises—Trespassers.**—An electric light company maintaining its overhead and guy wires over the private premises of a railway company need not protect trespassers thereon, nor is it liable for injury to them caused by their coming in contact with a live guy wire. (p. 444.)

Watson & Chapman and S. S. Miner, for the appellant.

Lyon & Hadsall, for the appellee.

**408** MONTGOMERY, J. This is an action for negligently causing the death of the intestate. The declaration avers that the defendant maintained a large number of electric wires in the city of Owosso, one of which was located near the south bank of the Shiawassee river and north of the Ann Arbor Railroad, near a brick building known as the "Old Electric Power-house," and was fastened to a pole thirty feet high; that, in order to hold said pole in position, said defendant had placed a guy wire connected with said pole at the top, and running southwesterly, fastened at the top of a post five or six feet high, and that the company had carelessly and negligently placed said guy wire in such a position that it came and was in contact with the electric wire, and thus became a live wire; that said guy wire was located on the west side of a wagon road or track, which was frequently traveled both by foot-passengers and by teams; that a person traveling along the track was liable to come in contact with the wire, or liable to put his hand against it, and that it became the duty of the defendant, knowing that said track and grounds were so used as aforesaid, not to locate a guy wire, charged with electricity sufficient to produce death, in and near said track and grounds, so that foot-passengers, or any other travelers, would be in danger of coming in contact therewith, or in any manner getting against the same. The declaration further avers that the decedent was passing along the street, highway, and track in a prudent and careful manner, and, without negligence on his part, came in contact with said guy wire, so charged **409** with electricity, and was instantly killed. On the trial the circuit judge directed a verdict for the defendant, and the case is before us for review on error.





"Ann Arbor Depot" there was a sign erected reading, in substance, "Dangerous! The public is hereby warned not to trespass upon these grounds, as this is not public property." The plaintiff introduced testimony tending to show that the place marked "Traveled Way" on the plat had been traveled by teams, and sometimes by pedestrians, having business with the proprietors of the coalsheds, woodsheds, stockyards, and, to the east of the two extended sidetracks, with the so-called "Asphalt Works." Plaintiff also sought to show that there was a traveled way extending north past the old power-house, and that people sometimes drove around the power-house, and forded Shiawassee river at a point east of the power-house. The testimony, however, shows that it was customary, when attempting to ford the river—and this would appear to have been but on rare occasions, in the summer season—to go east between the two extended sidetracks, turn to the left, and cross the river, the traveled way being south of the old power-house. There was testimony that teams had driven past the old power-house, and turned around and come back. But there was nothing in the record to disclose that this was a public way. The most that can be said of the testimony is that people doing business at the old power-house might have used these premises. There was nothing to indicate an invitation to the public to enter upon them. The place where the injury occurred is north of the most northerly of the sidetracks, and the post supporting the guy wire is indicated as five feet and three inches high, two telephone poles lying near by. The evidence indicates that the deceased and a companion, having with them two bottles of beer, for some reason sought this secluded spot on the evening in question; and the manner in which the injury was received is not explained, except upon the theory that the deceased reached <sup>411</sup> up and took hold of this wire, and pulled it down, receiving the shock which caused his death. There is no evidence showing actual knowledge on the part of the officers of the company of the fact that this wire was a live wire. The most that is shown is negligence in failing to discover the condition.

In our judgment, the conclusion of the circuit judge was amply justified by the consideration that these premises were not intended as a resort, and that the defendant owed no duty to the decedent of guarding the premises. The case would fail from the fact that this is not a public way, and the evidence wholly fails to show it. The theory of the plaintiff that the decedent was following this way for the purpose of visiting the

asphalt works to the east would show that his presence at the point where the injury was received was wholly unnecessary. We think the case is ruled by *Hargreaves v. Deacon*, 25 Mich. 1, and it becomes unnecessary to inquire whether the evidence is sufficient to show due care on the part of the decedent. We place our decision upon the ground that no duty was owing to the decedent to keep these premises in a condition suitable for his occupancy: See, also, *Bledsoe v. Grand Trunk Ry. Co.*, 126 Mich. 312, 85 N. W. 738.

The judgment of the circuit court is affirmed.

Hooker, C. J., Moore and Grant, JJ., concurred.

Long, J., did not sit.

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*The Owner of Private Grounds* is under no obligation, in the absence of willful or wanton negligence, to keep them in a safe condition for the benefit of trespassers: *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, and cases cited in the cross-reference note thereto; *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644.

*It is the Duty of Electric Companies* to use the highest degree of care practicable to avoid injury to everyone who may lawfully come in proximity to its wires: *Fitzgerald v. Edison Electric etc. Co.*, 200 Pa. St. 540, 50 Atl. 161, 86 Am. St. Rep. 732, and cases cited in the cross-reference note thereto.

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## HOLMES v. HOLMES.

[129 Mich. 412, 89 N. W. 47.]

**MORTGAGES—Reformation.**—If the consideration for a mortgage is much more than adequate, and the mortgagee is not shown to have understood that anything else was intended, except by silent acquiescence in the things done, the mortgage will not be reformed so as to make it more unfavorable to the mortgagee than it is by its terms. (p. 446.)

**MORTGAGES—Parol Evidence to Vary.**—The plain terms of a mortgage, valid on its face, cannot be varied by proof of a parol agreement of a different tenor entered into by the parties at the time of the execution of the mortgage. (p. 446.)

**MORTGAGES—Gift of Interest.**—The acceptance by the mortgagee each year of a less amount than the interest due on the mortgage, and giving a receipt therefor stating that it was for interest in full for that year, shows an intention to give the remainder of the interest then due to the mortgagor, and constitutes a valid gift thereof. (p. 447.)

**UNDUE INFLUENCE—Evidence of.**—Undue influence exercised upon a person in procuring an assignment of property rights cannot be inferred solely from the advanced age of the assignor. (p. 447.)

**COTENANCY—Gift of Encumbrance.**—A gift may be made to one cotenant of an encumbrance upon the common property which will inure to his benefit alone. (p. 448.)

**COTENANCY—Gift of Mortgage on Common Property.**—The fact that a mortgage makes a gift by assignment of the mortgage to one who is a cotenant with the mortgagors does not avoid the gift or prevent its enforcement by the assignee against his cotenants. (p. 448.)

Stewart & Bliss and D. Bondeman, for the appellants.

J. B. Shipman and H. H. Barlow, for the appellees.

**413** MONTGOMERY, J. Complainants' grandfather died intestate, owning personal property valued at upward of one hundred and sixty-eight thousand dollars, and real estate valued at twenty-five thousand dollars, leaving a widow, Mary Holmes, seventy-seven years old, and four children. Upon a settlement of the estate, Mary Holmes transferred to the children all her interest, both real and personal, in the estate of her husband, and took in return four mortgages, one from each of the children, each "to secure the payment of the sum of five thousand dollars, . . . . the receipt whereof is hereby confessed and acknowledged, in manner following, to wit: Interest annually at seven per cent, payable subject to the order of Mary Holmes. This mortgage to become null and void at the decease of the said Mary Holmes."

Defendants contend that there was an oral understanding when these mortgages were made that the mortgagors should each pay an equal share of any money asked for by their mother under the mortgages. Defendant Sarah E. Holmes, complainant's stepmother, is the only witness whose testimony tends to show such an arrangement, assented to by Mary Holmes; and she does not testify that Mary Holmes expressly assented to it, but says: "She was present whenever the thing was talked over, and she seemed willing, but I don't remember any particular conversation they ever had in which she joined. Q. Or said anything about it at all? **414** A. No, sir; but she acknowledged, of course, that she did it of her own free act, when she signed her rights away."

Each of the children paid their mother twenty-six dollars a year on these mortgages. One receipt was introduced in evidence, running to John T. Holmes, complainants' father, stat-



ing the amount paid, and describing it as "interest on his mortgage for 1895." This receipt, it was testified, resembled in form other receipts, which had been lost or destroyed. After the death of John T. Holmes intestate, Mary Holmes assigned the mortgage given by him, for the foreclosure of which this suit is brought, to complainants, his children by his first wife, evidently, as the testimony indicates, for the purpose of "evening up" between the two sets of children. The assignment is of the obligation mentioned in the mortgage, "and the moneys now due, and the interest that may hereafter grow due, thereon." At the same time Mrs. Holmes receipted for interest to that date upon the three other mortgages. The indorsements, as well as the assignment, were without consideration. Defendants contend that the receipt introduced in evidence, together with the surrounding circumstances, including the receipting for accrued interest upon the other mortgages, and the parol testimony, shows a gift to John T. Holmes of the unpaid interest on this mortgage up to January 1, 1899. Defendants further contend that the assignment was the result of undue influence, and that complainants, being tenants in common with defendants, could not acquire by gift an outstanding encumbrance, and hold it adversely to defendants.

1. The most liberal construction possible of this mortgage, in favor of the mortgagor, is that the mortgagee should have, during her life, as much of the accumulated interest as she desired. It follows that, at the time of the assignment, she was entitled to demand the accumulated interest, unless she had given it, or a part of it, to her son; and it follows from this that, if she chose, she might sell or give away her interest, instead of foreclosing. Such an <sup>415</sup> oral understanding as defendants sought to show was at variance with the terms of the mortgages, which each gave the mortgagee the right to demand the interest to date at any time. Certainly, where the consideration for the mortgage, as it read, was, as in this case, much more than adequate, and where the mortgagee is not shown to have understood that anything else was intended, except by silent acquiescence in the things done, a case is not made for such a reformation of the mortgage as will make it more unfavorable to the mortgagee than it is by its terms. That being so, its plain terms cannot be varied by parol: See *Dunham v. Provision Co.*, 100 Mich. 79, 80, 58 N. W. 627; *Phelps v. Abbott*, 114 Mich. 88, 72 N. W. 3.

2. The evidence satisfies us that, during the lifetime of John T. Holmes, payments were made to Mary Holmes annually, and receipts were given each year, signed by Mary Holmes; and these receipts were, in form, similar to the following:

"\$26

Bronson, April, 1896.

"Received of John T. Holmes twenty-six dollars, interest on his mortgage for 1895.

MARY HOLMES."

The question presented is whether this amounted to a gift of all interest above the amount received from year to year. We are disposed to think that such was the intention, and that the instrument should be so construed. That such a receipt, showing the intention to accept a less sum in payment of the interest, would amount to a valid gift, is settled by *Green v. Langdon*, 28 Mich. 221. We think, therefore, that as to the interest accruing during the lifetime of John T. Holmes, and covered by the payments made by him upon receipts in the form above quoted, the mortgage is to be deemed satisfied.

3. We are not able to find in the record any evidence of undue influence. There is nothing, other than the age of Mary Holmes, to indicate that she is susceptible to undue influence. The provision which she sought to make for complainants was not unreasonable. The purpose evidently <sup>416</sup> was, as before stated, to even up between the children of John T. Holmes by his first marriage and the children of the second marriage.

4. It is contended, however, that the complainants could not take title to this mortgage as against their cotenants, the defendants. In this connection it is contended that the evidence shows that the mortgage was purchased. This contention ignores the essence of the transaction. It was undoubtedly, in substance, a gift. The nominal consideration of one dollar did not change its character. The question presented here, then, is whether a gift may be made to one tenant in common of an encumbrance upon the common property. It is stated as a general rule that, if tenants in common become purchasers of an outstanding title or encumbrance, the benefit of such purchase is to be shared with their cotenants. Whether this rule applies to the purchase of an encumbrance has been questioned in one instance: See *Blodgett v. Hildreth*, 8 Allen, 186. But the great weight of authority undoubtedly applies the rule to encumbrances as well as to adverse titles. But as is well stated in *Freeman on Cotenancy*, section 155: "As the rule forbidding

the acquisition of adverse titles by a cotenant from being asserted against his companions is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent."

We have been unable to find an authority directly in point upon this question, but we deem it a case for the application of the doctrine that, where the reason for the rule fails, the rule fails. No hardship is worked to these defendants by the transfer of this mortgage from the mortgagee to the complainants; and there is no justice in saying that these complainants, the natural objects of the mortgagee's bounty, should, of all the world, be excluded from accepting it.

We think justice will be done in this case if we decree that the defendants, who are cotenants, may discharge <sup>417</sup> the lien as to their interest by contributing their proportion of the amount remaining due upon this mortgage, and upon their failure to do so the property be sold to satisfy such amount. The decree of the circuit court, as so modified, will be affirmed. The defendants will recover costs of this court.

Hooker, C. J., Moore and Grant, JJ., concurred.

Long, J., did not sit.

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*If One Tenant in Common* acquires an outstanding title or encumbrance on the joint estate, it ordinarily inures to the benefit of all, upon the others contributing to the expense: See the monographic note to *Venable v. Beauchamp*, 28 Am. Dec. 83-86; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016; *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 241, 52 Pac. 680; *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169, 51 N. E. 782; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663. The modification of this rule recognized in the principal case, however, seems reasonable.

CARSON, PIRIE, SCOTT & CO. v. FINCHER.

[129 Mich. 687, 89 N. W. 570.]

**BANKS AND BANKING—Checks—Collection.**—If a check is placed in a bank other than the bank upon which it is drawn for collection, it is the duty of the collecting bank, in order to charge the maker, to forward it in proper time to a subagent, selected with due care, and failing in such duty, the collecting bank is liable for any loss resulting therefrom. (p. 452.)

**BANKS AND BANKING—Checks—Collection.**—The bank upon which a check is drawn is not a suitable subagent for its collection, to be selected by the bank with whom the check has been deposited for collection. (p. 452.)

**BANKS AND BANKING—Checks—Collection—Liability of Maker of Check.**—Even though a bank with which a check is left for collection selects an improper agent to collect it, the drawer is liable if he had no funds in bank to pay the check had it been presented in proper time, or if the bank had no funds to pay it, and the drawer is given timely notice of nonpayment. (p. 452.)

**BANKS AND BANKING—Collection—Liability of Drawer of Check.**—If a bank with which a check is left for collection forwards it by mail to the bank upon which it is drawn, this is not such a presentation of the check as will charge the drawer, provided the check would have been paid if presented in proper time and in a proper manner. (p. 452.)

**BANKS AND BANKING—Collection of Checks—Fraud of Drawer.**—Knowledge by the drawer of a check that the bank upon which it is drawn is not strong financially, but without knowing that it would not be paid if properly presented is not sufficient to charge him with fraud in drawing the check, nor estop him from setting up the defense of want of timely notice of nonpayment. (p. 453.)

Smith, Amis, Hoyt & Irwin, for the appellants.

Hartwick & Skeels and W. S. Hanson, for the appellee.

**688 MOORE, J.** The plaintiff is a wholesale dealer residing and doing business at Chicago, Illinois. The defendants are retail dealers residing and doing business in the village of Pentwater, in this state. On the 8th of May, 1900, defendants were indebted to plaintiff for goods purchased to the amount of one hundred and ninety-two dollars and thirty-nine cents, which account was subject to a discount if paid within thirty days, leaving the account, if paid in the month of May, one hundred and eighty-four dollars and twenty-nine cents. The defendants, on the eighth day of May, 1900, mailed to plaintiff their check drawn on Nielsen & Co., bankers at Pentwater, for one hundred and eighty-four dollars and twenty-nine cents. Plaintiff, on the 10th of May, 1900, received said check, and deposited it



with the First National Bank of Chicago for collection, which bank forwarded the check by mail to Nielsen & Co., who received the same on May 11th, but made no remittance therefor. The defendants, after learning of the receipt of said check by plaintiff, heard nothing further concerning it until on or about the twenty-second day of the same month, on which day they were notified by plaintiff that the check had not been paid. Nielsen & Co. continued to do business to and including Saturday, the nineteenth day of May, but did not open their doors on Monday, the 21st, and on or about the last-named day said bank was put into the possession of a receiver. The receiver returned the check to plaintiff. There was a mail twice daily each way between Pentwater and Chicago; also an express daily each way, with usual route and local agents. It is the claim of defendants that when said check was drawn, and at all times, defendants had sufficient funds on deposit at said bank to meet said check. In July the bank of Nielsen & Co. was declared bankrupt. The petition filed in the United States district court <sup>689</sup> to have said firm adjudicated bankrupt states two grounds of bankruptcy—one as occurring on the 23d of April, 1900; the other, on the 18th of May following. The defendants claim there was no evidence that the defendants had no money in the hands of Nielsen & Co. at the time the check was drawn, or that they had reason to believe the check might not be paid on presentation.

The trial judge instructed the jury, among other things, as follows:

"1. If you find that defendants had no effects in the hands of Nielsen & Co. at the time the check in question was drawn, and had no reason to expect any, and had reason to believe that the check would not be paid when presented, notice of dishonor could do them no good, and want of notice would not be a defense.

"2. If you find that, at the time the check was drawn, the drawee bank was in an insolvent condition, that checks drawn by defendant on said bank while he had funds there had not been paid when presented, and defendant had knowledge of this fact, which he did not communicate to the plaintiff, and plaintiff had no knowledge of such insolvent condition, the drawing of a check under these conditions is a fraud on the payee, and defendant was not entitled to notice.

"3. If you find that the defendants drew a check for the purpose of using that as a means of withdrawing their funds from

the bank in anticipation of its failure, and sent it to the plaintiff, who was ignorant of its condition, they were not bona fide makers, and cannot plead want of notice.

"4. Inasmuch as checks are payable in current funds, and inasmuch as the bank cannot act as agent of both parties, it is a duty to have them presented by some party who can receive the funds. In this case, as the evidence shows, the presentation was made by mail; and they unquestionably asked the parties to remit, and that would be, of course, by draft. Those things are established."

The judge told the jury the check had not been properly presented, and then said:

"The plaintiff says that, while that may be a rule, they are exonerated from taking that course, because of the fact that Nielsen & Co. were insolvent, and because of the <sup>690</sup> fact that defendants here knew that they were insolvent, and knew, or had a right to know, that if the check was presented there it would not be paid, and consequently they have not suffered. Well, if they have not, gentlemen, and they knew these things, and that check was sent for the purpose and did commit a fraud on the parties to whom they sent it, by drawing a check upon a bank—a check that was absolutely worthless—and sending it to them, why, they are not entitled to notice; they have not lost anything because it was not presented there by some man in proper person; and, if you find that to be the fact from the evidence in the case, of course, your verdict will be for the plaintiff.

"5. There is another reason why the plaintiff claims that the defendants are not entitled to notice, and that is that the defendants did not have any funds there to pay the check at the time it was drawn, at the time it was presented, taking into consideration the other drafts they had made. Now, if that is true, of course, the defendants were not entitled to notice.

"6. Now, those are really the two questions of fact upon which you gentlemen must pass. Was the situation such, and were they known to the defendants in this case at the time that the check was drawn, that they committed a fraud by imposing upon plaintiff, to whom they sent this check? If they did, the plaintiff is entitled to recover.

"7. If they did not have any funds there with which to pay the check, the plaintiff is entitled to recover."

To which instructions error is assigned. Under the charge, a verdict was rendered in favor of plaintiff and against the de-

fendants for the sum of one hundred and ninety-nine dollars, and eighty cents.

It is claimed there was no evidence to support the instructions. The testimony of Mr. Fincher tends to show that, while the bank-books showed a balance of seven hundred and seventy-five dollars and twenty-two cents in favor of defendants, when the check in question was drawn the firm had accepted a draft and drawn checks that were outstanding, amounting to seven hundred and seventy-three dollars and six cents. As against this testimony, there was testimony tending to show the defendants had funds in the bank sufficient to pay this and all other outstanding checks, and that the bank had funds when the check was received at the bank, and that, if the <sup>691</sup> check had been presented over the counter, it would have been paid. This raised a question for the jury.

It is pretty well settled in this country that when a check is sent to some other place than where the bank is located upon which it is drawn, and it is put into a bank for collection, it is the duty of the bank to forward it in proper time to a subagent selected with due care. The bank should use every reasonable precaution to secure the collection, if possible; and if it has been careless in the choice of an agent, and selected one it knew, or ought to have known, was an improper one, it will be answerable for any injury which results therefrom. The bank upon which a check is drawn is not a suitable agent for its collection, and the judge was right in so instructing the jury: 1 Morse on Banks and Banking, 3d ed., sec. 236. But even though an improper agent has been selected, if the drawer of the check had no funds with which to pay the check had it been presented in proper time, or if the bank had no funds with which to pay it, no harm has come to the maker of the check, and, if given timely notice, he would continue to be liable; but if, on the other hand, as claimed by the defendants, the maker of the check had funds to his credit in the bank, and the bank had funds, and the check would have been paid if presented over the counter in proper time, then the maker of the check would have been discharged.

We do not think, under the evidence in the case, it was proper to say to the jury that they might say, under the facts proven, that defendants committed a fraud by sending plaintiff this check. It is true the defendants had learned facts from which they might infer that the bank was not as strong as many banks; but it does not appear that they had any reason to suppose that, if the check was presented properly and in a reasonable time,

it would not be paid. They had a right to assume that the plaintiff was familiar with the law, and, if it accepted the check, it would select a proper agent to present it, and that it would be presented in proper time, and, if it was not paid, <sup>692</sup> defendants would be notified. If the plaintiff had done what it was its duty to do, no harm would have come to it. If the check was paid, that would have ended the transaction. If it was not paid, defendants would have been notified, when it would have been their duty to make the check good, and no harm would have come to the plaintiff. This being so, we cannot see how the inference of fraud could be drawn from what was done.

For these reasons, judgment is reversed, and a new trial ordered.

Hooker, C. J., and Grant, J., concurred.

Long and Montgomery, JJ., did not sit.

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*To Charge the Drawer of a Check*, the holder is required to present it within a reasonable time: *Morris v. Eufaula Nat. Bank*, 122 Ala. 580, 82 Am. St. Rep. 95, 25 South. 499. And forwarding a check by mail direct to the drawee bank, by a bank undertaking its collection, is not a proper presentation: See the monographic note to *Minneapolis etc. Co. v. Metropolitan Bank*, 77 Am. St. Rep. 623-625. But if presentment and notice of nonpayment or dishonor will be of no benefit to a drawer or indorser, as where the drawer has no funds in the bank or the bank has become insolvent, they may be dispensed with: See the monographic note to *Holmes and Sons v. Briggs*, 17 Am. St. Rep. 809, 810; *Industrial Trust etc. Co. v. Weakley*, 103 Ala. 458, 49 Am. St. Rep. 45, 15 South. 854.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSISSIPPI.**

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PEOPLE'S BUILDING AND LOAN ASSOCIATION v. Mc-  
PHILAMY. PEOPLE'S BUILDING AND LOAN AS-  
SOCIATION v. HAWKS.

[81 Miss. 61, 32 South. 1001.]

**BUILDING AND LOAN ASSOCIATIONS—Usury Laws** have no application to a domestic building and loan association dealing only with its own members. (p. 455.)

**BUILDING AND LOAN ASSOCIATIONS—Liquidation—Accounting—Solvency.**—If a building and loan association goes into voluntary liquidation prematurely, the method of accounting is the same whether it is solvent or insolvent. (p. 455.)

**BUILDING AND LOAN ASSOCIATIONS—Borrowing Members—Credit for Dues.**—In settling the affairs of a building and loan association the borrowing members are not entitled to credit for sums paid by them as dues on their stock. (p. 456.)

**BUILDING AND LOAN ASSOCIATIONS—Borrowing Members—Dual Capacity.**—A borrowing member of a building and loan association occupies a dual relation thereto. In his capacity as borrower he is its debtor. In his capacity as shareholder he is a member of the association. (p. 456.)

**BUILDING AND LOAN ASSOCIATIONS—Borrowing Members—Payment by.**—What a borrowing member of a building and loan association pays as stock dues, he pays in his capacity as a shareholder, and what he pays as interest he pays in his character of debtor on his loan. (p. 456.)

**BUILDING AND LOAN ASSOCIATIONS—Borrowing Members.**—Insolvency of a building and loan association does not release a borrowing member. He remains liable to his just proportion of all losses and expenses. (p. 456.)

**BUILDING AND LOAN ASSOCIATIONS—Insolvency—Liability of Borrowing Members.**—Upon the insolvency of a building and loan association, a borrowing member must pay up his loan, less credits to which he may be entitled, at once in a lump sum with legal interest. (p. 456.)

**BUILDING AND LOAN ASSOCIATION—Insolvency—Abrogation of Contracts.**—If a building and loan association goes into insolvency or premature liquidation its contracts are thereby abrogated only so far as they are executory. (p. 457.)

**BUILDING AND LOAN ASSOCIATIONS—Insolvency—Liability of Borrowing Member as Stockholder.**—A borrowing member of a building and loan association after its insolvency, in his capacity of shareholder, is liable for the payment of his just pro rata of the expenses and losses of the association, including receivers' commissioners, court costs, etc. (p. 457.)

**BUILDING AND LOAN ASSOCIATIONS—Insolvency—Borrowing Members—Credits for Stock.**—Upon the settlement of the affairs of an insolvent building and loan association a borrowing member is entitled to have whatever his shares of stock prove to be intrinsically worth credited on his loan, and if a reasonably certain estimate of what his stock is worth, not exceeding its true value, can be made prior to the final settlement, the court may then credit such estimated value as payment on his debt. Whether this shall be done prior to final settlement rests in the sound discretion of the court. (p. 457.)

**BUILDING AND LOAN ASSOCIATIONS—Insolvency—Liability of Borrowing Members.**—Upon the insolvency of a building and loan association a borrowing member cannot claim credit for dues paid, but must pay his whole debt to the association and their share in the assets pro rata with the other members. (p. 459.)

**BUILDING AND LOAN ASSOCIATIONS—Insolvency Procedure.**—Borrowing members of an insolvent building and loan association cannot increase their rights against, or diminish their liabilities to it, by bringing suits against it which are not administrative in their character. (p. 465.)

S. B. Watts, McWillie & Thompson, Alexander & Alexander, for the appellant.

Amis & Dunn and S. A. Witherspoon, for the appellees.

<sup>76</sup> WHITFIELD, C. J. These cases will be considered and determined together, as <sup>77</sup> they are one, so far as the method of accounting is concerned. This is a true building and loan association, and it is a domestic building and loan association, and hence no question of usury is involved. It had been operating for some years, and, finding that its business ceased to be profitable, it went into voluntary liquidation in September, 1898. We are inclined to think that the association is insolvent, but whether so or not is not material in considering the method of accounting. The equitable principle of accounting must be the same whether the association be solvent or insolvent. The question for consideration in these cases is, therefore, where an insolvent association goes into voluntary liquidation prematurely, what is the proper method of accounting between the borrowing and nonborrowing members, respectively, on the one hand, and

the association, on the other. And the precise question here, more particularly is, Should a borrowing member be credited on his debt with the amount of dues he has paid in on his stock? A borrowing member of a building and loan association occupies a dual relation to the association. In his capacity as borrower, he is a debtor. In his capacity as shareholder, he is a member of the corporation. What he pays as interest is paid in his character as debtor on his loan. What he pays as stock dues is paid in his character as stockholder. The two are separate and distinct, and must be so dealt with: *Hundermark v. New South etc. Loan Assn.* (Miss.), 29 South 528. When a building and loan association becomes insolvent, there is nothing to do but wind up its affairs. The shareholder who has been a member remains a member, liable to his just proportion of losses and expenses. He suffers a hardship in this: that, instead of having his payments on his loan distributed in small installments over many years, he is compelled by the necessity of the situation, and the nature of the building and loan association, to pay up his loan in one lump sum, with legal interest. This often involves great injustice to him, but it is, nevertheless, one of the risks which he assumed in becoming a member of this mutual association.<sup>78</sup> There are instances where, because of peculiarly framed contract stipulations, a shareholder may cease to be a member upon insolvency or premature liquidation, but we speak of the ordinary membership, with the usual incidents in a building and loan association, such as we have before us in these cases. It is thoroughly settled by the authorities that when such insolvency ensues, or such premature liquidation occurs, the contract between the borrower and the association is abrogated; but there is diversity of opinion as to the point of time from which it is to be abrogated. Some of the earlier authorities held that, since the association cannot do for a borrower what it contracted to do, the contract is abrogated in such case *ab initio*, and the simple relation of debtor and creditor between the borrower and the association established from the beginning, and that all payments made by the borrower, under whatever name—whether interest, premium, fines, stock dues, or what not—shall be credited upon the loan, and only the balance, with legal interest, collected from the borrower. In other words, the nonborrower would in such case sustain the whole burden of the loss incurred up to the time of such insolvency. This ignores the fact that the borrower was a member of the association up to the time of insolvency; had proceeded all along

upon that basis, bearing his proportionate part of expenses and losses up to the time of such insolvency—bearing them as his part of losses and expenses, under that name. Close analysis makes it plain that this is not just to the nonborrower, for under this method the borrowing member would get back, entire, all his stock dues, without abatement of a single cent, whereas the nonborrower would only get back such portion of his stock dues paid in as would result from the winding up of the affairs of the association—less than the whole in every case of insolvency. The true doctrine undoubtedly is that the contracts are to be abrogated for the future—that is to say, so far as they are executory—but that, prior to insolvency, they shall stand. In other words, up to insolvency the payments must stand in the character they had when made; for example, stock dues as payments made by the member in his capacity as member; but after insolvency the borrower's obligation to pay stock dues, etc., shall cease, because the consideration for such payments fails from that time forward. Merely because the association becomes insolvent, what he has theretofore paid as his allotted part of expenses and losses has not by some occult process changed its character, and become interest or principal paid on the debt. He remains a member after insolvency, even, charged, just as the nonborrowing member, with the duties and obligations of a member, until the final settlement of the affairs of the association, which obligations consist, however, after insolvency, in simply paying his just pro rata of expenses and losses; expenses including, of course, such things as receiver's commissions, court costs, etc. He will be entitled when such settlement is made to have whatever his share of stock proves ultimately to be worth then credited to his loan. More than this, if there can be a reasonably certain estimate of what his shares are worth prior to the final settlement—such an estimate as will surely not exceed their value—the court may, in cases like these, credit such estimated value as payment on the debt. Whether such value of the shares shall be estimated and credited in advance of the settlement, or only at the settlement, must be determined by the chancery court in its sound discretion. The earlier cases to which we referred, holding that stock dues are to be credited on the debt, and that the contract is to be abrogated from the beginning, and the borrower treated as a mere debtor from the beginning, are as follows: *City Loan etc. Assn. v. Goodrich*, 48 Ga. 415; *Waverly etc. Assn. v. Buck*, 64 Md. 338, 1 Atl. 561; *Cook v. Kent*, 105 Mass. 246; *Buist v. Bryan*,



44 S. C. 121, 21 S. E. 537, 51 Am. St. Rep. 787, and various other authorities. See, also, 4 Am. & Ency. of Law, 2d ed., 1081, and note; 7 Thompson on Corporations, 7359, note 63. Add to this the late case of *Hale v. Barker*, <sup>80</sup> 129 Cal. 419, 62 Pac. 168. See, also, *Carpenter v. Richardson*, 101 Tenn. 176, 46 S. W. 452. We are inclined to think that the California case of *Hale v. Barker* is not in accord with later cases decided in that state, as pointed out by counsel for appellant. We refer to it, however, as the best reasoned case on that side. We think a careful consideration of the recent and best considered cases shows that this early doctrine is being departed from, as the nature of building and loan contracts becomes better understood, and the practical operation of such associations, under their contracts, more fully disclosed. The true doctrine must be that set forth by Judge Thompson, in his work on Corporations, volume 7, section 8796, as follows: "The effect upon the borrowing members of a premature dissolution, or what practically amounts to the same thing, requires some notice. In return for the undertakings of the borrower in the transaction of loan or advancement, as they have been pointed out, there is an implied undertaking on the part of the association that the borrower shall have the advantage of the building association scheme in the liquidation of the whole of his indebtedness—i. e., that it shall be by means of gradual payment, and that he shall participate, and have the opportunity of reducing his liability by his participation, in the profits of a continuing business, to be carried on to a fixed end. Where, through bad management, financial misfortune, loss of membership, or any other cause, the career of the association is brought to a premature close, the borrower is compellable forthwith to pay the balance due from him on his security, although, in terms, only given for installments. He is, therefore, deprived of some proportion of the advantages, the prospects of which induced him to assume the burden of his original obligation. There remains nothing to compensate him for his liability to make up the premium, to keep up stock payments, to pay fines, etc. The consideration of the liability failing, the liability itself must, in a proportionate degree, fail also. In other words, there remains on the one side a claim; on the other, <sup>81</sup> a liability to be measured simply by the amount of money actually advanced. In such case, therefore, all the borrower can be held for, on the theory of a rescission of at least part of his contract, and remitting the parties, as to the rest, to the position of the ordinary lender and

the borrower, is the amount received by him from the association, with legal interest. Upon this point nearly all the authorities agree. Some of them also declare the borrower to be entitled to a reduction from this amount of all periodical payments of dues and interest paid by him. In others it is declared that the borrower shall be required to pay back what he has actually received, with interest, and without deduction on account of any stock payments, and that he will then be entitled, after the debts of the association have been paid, to a pro rata dividend, alike with the nonborrowing stockholders, upon what he has paid into the association as dues. When it is remembered that the borrower still rests under the membership liability to contribute toward the losses and expenses of the association, it is clear that the former of these methods cannot be correct; for by it he will escape some part of his share of the losses. But, on the other hand, the hardship and increased expense of settlement which may result from requiring the borrower to pay back all that he has received, without any credit for the dues he had paid in, remitting him to final distribution for a return of the excess of his payment over what shall be found justly due from him, would seem to indicate the propriety of a third method, wherever practicable—viz., to ascertain what the receipts, profits, and losses of the society have been, what its liabilities are, what available assets are on hand, and what, accordingly, is the present real value of every share, making allowance for the expenses of settlement; to credit the amount on the borrower's debt in respect to each share held by him, and charging him with the sum actually advanced to him and interest, reduced by part payments of interest and premium, collect from him only the balance": See, also, Endlich on Building Associations, sec. 477, and an elaborate note in 5 82 Am. & Eng. Dec. Eq., to *Williams v. Maxwell* (123 N. C. 586, 31 S. E. 821), at p. 254, par. 2, where the same doctrine is very clearly and fully stated, with a full citation of authorities. The editor says: "Since the cessation of the business of the building association puts an end to the contract between it and its borrowing members, and makes their loans due and payable at once, it converts the relation between them into that of mere debtor and creditor, and consequently should entitle the borrower to have the dues paid credited upon the loan, if no equities supervene. Accordingly this rule is generally acknowledged to prevail in cases of a voluntary dissolution or cessation of business (*City Loan etc. Assn. v. Goodrich*, 48 Ga. 445;

Waverly etc. Assn. v. Buck, 64 Md. 338, 1 Atl. 561; Association v. Braden (Tex. Civ. App.), 32 S. W. 704), and has in a few instances been held to apply to the winding up of an insolvent association, when the contract of loan was usurious: Peters' Bldg. Assn. v. Jaacksch, 51 Md. 198; Rochester Sav. Bank v. Whitmore, 25 App. Div. 491, 49 N. Y. Supp. 862; Strauss v. Carolina etc. Loan Assn., 118 N. C. 556, 24 S. E. 116; Buist v. Bryan, 44 S. C. 121, 51 Am. St. Rep. 787, 21 S. E. 537. But inasmuch as this doctrine enables the borrower to evade his liability to share in the losses of the association, it can only be upheld on the theory that he is not a member thereof; and, whenever he is to be regarded as such, he cannot claim credit for dues paid, in case of the insolvency of the association, but must pay up the whole debt, and share in the assets pro rata with the other members (Sullivan v. Stucky, 86 Fed. 491; Curtis v. Granite State etc. Assn., 69 Conn. 6, 36 Atl. 1023, 61 Am. St. Rep. 17; Browne v. Archer, 62 Mo. App. 277; Weir v. Granite State etc. Assn., 56 N. J. Eq. 234, 38 Atl. 643; Strohen v. Franklin etc. Assn., 115 Pa. St. 273, 8 Atl. 843; Association v. Carroll, 15 Pa. Co. Ct. Rep. 522, 4 Pa. Dist. Rep. 6; Lepore v. Association, 5 Pa. Sup. Ct. 276; affirming Association v. Lepore, 17 Pa. Co. Ct. 426; Rogers v. Hargo, 92 Tenn. 35, 20 S. W. 430), . . . . unless the actual loss and expense of winding up are capable of calculation, in <sup>83</sup> which case it is preferable practice to permit him to pay the balance between the actual value of his stock and the loan, or, as it has been otherwise expressed, the difference between the dues paid in and the loan, plus his pro rata share of the defalcation of the association: Reddick v. United States etc. Assn., 106 Ky. 94, 49 S. W. 1075; Williams v. Maxwell, 123 N. C. 586, 31 S. E. 821, 5 Am. & Eng. Dec. Eq. 224."

We select two other opinions for their marked ability in setting forth this view. They are the opinion of Sherwin, J., in Hale v. Kline 113, Iowa, 526, 85 N. W. 814, and the opinion of Brannon, J., in Young v. Improvement etc. Assn., 48 W. Va. 514, 28 S. E. 670, this last being the finest opinion we have seen on the subject. In the former, Justice Sherwin says: "The only question presented for our determination in this case is whether the defendants are entitled to credit for any part of the dues paid on the twelve shares of stock issued to A. D. Kline, and assigned by him as collateral security for the loan and premium in question. At the outset of the discussion of this question, we should say that the association was purely a mutual

one, that every stockholder was a member thereof, and that every member thereof was a stockholder. Except as to the liability incurred by borrowing money of the association, every member assumed the same liabilities, and was entitled to a proportionate share of its earnings, from whatever source derived. With this mutuality of interest and liability in view, what are the rights of the defendants, and the rights of the other members and creditors, as represented by the plaintiff? There were two classes of members, which we designate as borrowers and nonborrowers. To become a borrower, it was necessary to offer a premium of so much per share on the shares held by the applicant. The premium which these defendants contracted to pay was six hundred dollars, represented by one-half the amount for which they gave their note. If the association had continued as a going concern until the monthly dues paid on the twelve shares of stock had matured the stock then, by the <sup>84</sup> terms of the note itself, a surrender of the stock could have been made in full payment of the money actually received and of the premium represented in the note; and in such case the defendants would, of course, receive indirectly the amount paid in dues. But the association became insolvent before the maturity of the stock, and it is obvious that the rights and equities of the members are thereby placed upon a different footing. This changed condition has been held by some courts to operate as a rescission of the entire contract, and to leave the members to an equitable adjustment of their rights and liabilities. It is conceded by all or most of the courts, however, that the insolvency of such a mutual association releases the stockholders from further payment of dues on stock. It is the almost universal holding that, in the settlement of the affairs of an insolvent mutual association, a borrowing member, whose stock has not matured, shall be held for the amount of money actually received by him, with interest thereon, less the premium actually paid by him for the loan, and less the interest on the monthly payments of interest made by him. This rule applies to cases where the affairs of the association are not so far settled as to ascertain the value of the stock. When the value of the stock can be determined, the borrower would then be entitled to credit for its value in addition to the items heretofore mentioned: *Wilcoxon v. Smith*, 107 Iowa, 555, 70 Am. St. Rep. 220, 78 N. W. 217; *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010; *Phelps v. American Savings etc. Assn.* 121 Mich. 343, 80 N. W. 120; *Leahy v. National Bldg. etc. Assn.*, 100



Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625; *Knutson v. Northwestern etc. Assn.*, 67 Minn. 201, 64 Am. St. Rep. 410, 69 N. W. 889; *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. 430; *Weir v. Granite State etc. Assn.*, 56 N. J. Eq. 234, 38 Atl. 643; *Curtis v. Granite State etc. Assn.*, 69 Conn. 6, 61 Am. St. Rep. 17, 36 Atl. 1023, and see note to this case, 61 Am. St. Rep. 24; *People v. Lowe*, 117 N. Y. 175, 22 N. E. 1016; see, also, Endlich on Building Associations, 2d ed., 477; Am. & Eng. Ency. Law, 2d ed., 1080; *Post v. Building etc. Assn.*, 85 97 Tenn. 408, 37 S. W. 216; *Strohen v. Franklin etc. Assn.*, 115 Pa. St. 273, 8 Atl. 843." In the latter opinion, *supra*, Judge Brannon says: "Seeing that, upon insolvency of a building association, it must be wound up, and to that end that its borrowing members, though their debts are not yet payable, must pay up at once, the question is one of account between them and the association. How shall they be charged? I answer, with debt and interest: Endlich on Building Associations, 528-531. With what shall they be credited? I answer, with payments made expressly on such indebtedness, and with fines and premiums, but not with periodical dues paid on stock. Endlich on Building Associations, 477. . . . Counsel for the knitting companies say, as above stated, that when those companies made the contracts of loan, and assigned their stock for security for the debt, and the contract gave them the power to pay dues on stock up to a certain amount, and thereby cancel their indebtedness, they were not members in future, and cannot be held to be still paying dues on stock; that such payments are not to be credited on stock, as would be the case of nonborrowing members, but all payments of dues must go on their indebtedness. The proposition that they cease to be members is not sound in law. They still continued members of the association: 7 Thompson on Corporations, secs. 8772, 8773, where it is stated that only Virginia and the District of Columbia have held that the relation of stockholder ceases under the circumstances stated above. See same work, page 332, saying: 'The member, as a borrower, is still a member, with all his rights, except as pledged. He may vote, hold office, transfer his shares, subject to the lien, and do everything another shareholder may do.' *Lister v. Log Cabin Bldg. Assn.*, 38 Md. 115, holds the same doctrine. So Endlich on Building Associations, section 123: See 5 Am. & Eng. Dec. Eq. 234. To sustain the proposition that when these borrowing members gave their bond for the advance of money, and assigned their stock

as collateral, they ceased to be members, and were absolved from all obligations to sustain any share of losses, we are cited to <sup>86</sup> Endlich on Building Associations, section 81, reading thus: 'The liability to contribute to expenses ceases with the cessation of membership bona fide, and with the consent of the association. If, upon becoming a borrower, the member relinquishes his membership, or if, being an investor merely, he avails himself of a provision in the rules or by-laws of the association, or of the statute supreme over it, to withdraw himself from it, he cannot subsequently be made liable for its debts and losses, and called upon by the society to contribute toward their payment.' Clearly so. If he relinquishes his membership or withdraws, he is no longer a member; but merely borrowing, giving bond and pledging stock as collateral, do not lose him the benefits or release him from the obligations of membership. . . . Being still a member after such borrowing, the party occupies the twofold character of debtor and stockholder, and his payments on debts are payments of debts, and his payments on stock are payments on stock—so intended in both cases. When insolvency comes, he is still a member of the association, organized as well for his benefit as that of other members; and other members not borrowing are entitled to call upon him to still occupy the status of a member, and help bear the burden of disaster. He has no right to apply his stock payments on his indebtedness. When insolvency comes, the original plan of the association is defeated. Such operations as were contemplated by all members, borrowers, and nonborrowers, are unavoidably frustrated. They cannot be accomplished. The association cannot demand further payments on stock, because, its business being stopped, it cannot apply such payments to effect the design for which they were stipulated to be made, and the consideration for their payment has ceased. Close up the affairs of the association is the only alternative. To do this, outstanding debts must be paid, chiefly from debts due from members, though not yet mature, because the association owns these debts as material assets, and indispensable to pay outstanding debts, and then to be divided among stockholders. The <sup>87</sup> member who is a borrower, as such, occupies the position of a borrower. The relation between the association and him makes him its debtor for the money advanced to him, and he must pay at once, to enable the association to do the only thing it can do—wind up. Out of the assets, including this indebtedness of this stockholder, a division is made, after

payment of debts among the stockholders, including this borrowing stockholder. His stock is worth what his dues and other sources of revenue make it worth. What he paid in dues must go on his stock, to constitute the capital stock, as he contracted to pay such dues on his shares of stock, not on his debt. Here he is a stockholder, not a debtor. His contract of subscription is for stock, and his dues go on that by contract. Only in one event, by the contract, can those dues paid for stock go to pay the debt; that is, when, in case of success of the association, those dues, with dues from other members and other sources of income, bring the stock to par, and thus discharge the debt, by the letter of the contract. But that being defeated by disaster, the setoff of stock against debts cannot be made. The member cannot be allowed to go on paying dues, in specific performance of the contract, for the company is incompetent to go on. The time has come when the outside debts must be paid—when members must suffer some loss. It is obvious, they ought to suffer this loss equally—borrowing and nonborrowing stockholders. Now, if you credit A's dues paid on his stock upon his debt, he gets the benefit of them in full, whereas B, who has no money borrowed from the association, but who paid the same amount of dues as A, gets no benefit from those dues. This, in justice, cannot be allowed. So the true rule is, in case of insolvency, to keep A in his twofold character—debtor and stockholder. Make him pay back to the common treasury what he borrowed from it, and thus end his relation of debtor; and later, when the assets have been collected, and the divisible fund, after the payment of debts, is found, give him his share in that fund, much or little. All shareholders will thus stand equal. There <sup>88</sup> are some authorities contra, but the great current of authority, the latest and best considered, as building associations have increased, sustain this position. In the great case, *Strohen v. Franklin etc. Assn.* 115 Pa. St. 273, 8 Atl. 843, the court stated the matter thus: 'The insolvency of the company puts an end to its operation as a building association. To a certain extent, it also ends the contracts between it and its members, and nothing remains but to wind it up in such manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burden equally, and not throw on either the borrowers or nonborrowers more than their respective share. That result may be reached by requiring the borrower to repay what he actually received, with

interest. He would then be entitled, after the debts are paid, to a pro rata dividend with the nonborrower of what he had paid upon his stock. He will thus be obliged to bear his proper share of losses. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses, and throw them wholly upon the non-borrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner.' To same effect, see 5 Am. & Eng. Dec. Eq. 254; *Leahy v. National Bldg. & Loan Assn.*, 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945, 5 Am. & Eng. Eq. 206; *Price v. Kendall*, 14 Tex. Civ. App. 26, 36 S. W. 810; *Eversmann v. Schmitt*, 53 Ohio St. 174, 53 Am. St. Rep. 632, 41 N. E. 139; *Weir v. Granite State Assn.*, 56 N. J. Eq. 234, 38 Atl. 643; *Wohlford v. Citizens etc. Assn.*, 140 Ind. 662, 40 N. E. 694; *Post v. Building etc. Assn.*, 97 Tenn. 408, 37 S. W. 216; *Thompson on Building Associations*, 396."

It follows from these views that the accounting in these cases was had upon the wrong basis. It should be remarked that the law of building and loan associations is just now assuming definite shape, and the learned and accomplished chancellor below <sup>80</sup> could hardly be expected to anticipate a doctrine as to accounting just now being for the first time firmly established.

There is only one other point that we will notice in these cases, and that is this: that these suits are not administration suits—not being brought as such. We do not think, however, that the form in which the suit has been brought should dominate the method of accounting. What these borrowers are equitably entitled to they should receive; but they should receive only that, whether the suits be administration suits or not. The equities by which the substantial rights are determined cannot be made more or less by the particular procedure resorted to. On the return of these cases into the chancery court, if there can be an estimate made of the value of the shares of these borrowers, such as will certainly not give them more than the shares will be worth on a final settlement, such ascertained value of the shares may be credited on the loan. If not, no stock dues should be credited on the loan, but the borrowers should be remitted to their right to receive whatever the value of these shares may be, when finally ascertained by the proper procedure.

Both cases reversed and remanded.



*Upon the Liquidation or Insolvency of a building and loan association, the borrowing members are entitled to a credit for the premiums paid by them, but not for interest or for dues paid on stock: Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317. There is, however, some diversity of judicial opinion on this question: See the monographic note to Curtis v. Granite State etc. Assn., 61 Am. St. Rep. 26, 27; Hale v. Cairns, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010; Leahy v. National Bldg. etc. Assn., 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625; Wilcoxon v. Smith, 107 Iowa, 555, 70 Am. St. Rep. 220, 78 N. W. 217.*

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## ILLINOIS CENTRAL RAILROAD COMPANY v. HARRIS.

[81 Miss. 208, 32 South. 309.]

### **RAILROADS—Round-trip Return Tickets—Rights Under.—**

The purchaser of a round-trip return railroad ticket, good only on the day of its issuance, is entitled to return on the only train running that day, although it is not scheduled to stop at the station where the ticket is sold. His expulsion from such train is wrongful and he is entitled to recover punitive damages therefor. (p. 467.)

**RAILROADS—Rights of Ticket Holder—Statements of Railroad Employés.**—Conversations between a railroad ticket agent, and the purchaser of a railroad ticket, or between a railroad flagman and such purchaser, cannot deprive the latter of his rights under the terms of the ticket. (p. 467.)

Mayes & Harris and J. M. Dickinson, for the appellant.

Alexander & Alexander, for the appellee.

**213** TERRAL, J. Appellee on Sunday evening, the third day of March, 1901, bought of the agent of appellant at Ridgeland an excursion ticket to Jackson and return, good for that day only. Late at night on the same day he boarded train No. 26, which was the only train upon which he could return; and after passing Tugaloo, and before reaching Ridgeland, he was, according to the evidence made on his side of the case, ejected from the train with insult and violence. He sued the company, recovered judgment for seventy-five dollars, and the company appeals.

The trial court instructed the jury that, if train No. 26 was **214** the only train upon which appellee could return to Ridgeland that day, his expulsion therefrom was wrongful. The company insists that the instruction was error, and cites Yazoo etc. R. R. Co. v. Rodgers, 80 Miss. 200, 31 South. 581, as being opposed to this view of the law. But in that case Rodgers re-

turned home the next day on his excursion ticket, and could have returned by one or more trains on the day he was refused passage on No. 6—a fast train not stopping at Egremont—if he had desired to do so; yet, declining to return on trains that would have placed him at home that day, he complained that a fast train, not scheduled for Egremont, excluded him from passage on it. In reply to repeated offers to bribe him, Conductor Howard made a slighting or insulting remark to Rodgers, but that incident was not a factor in the case. Having had opportunity to return to Egremont on the very day that he was refused passage by Conductor Howard, and having yet two days more for a return to Egremont, he insisted on returning to Egremont by the only train that never stopped at that point. That case was quite different from the one before us. It was, however, shown here, for the railroad company, that train No. 26 was not scheduled to stop at Ridgeland, and that the agent at Ridgeland, when selling the round trip ticket to Harris, told him that if No. 26 should be late, or behind its scheduled time, he would find difficulty in returning upon it, and that Harris replied he would take the chance. Appellant showed also that Harris, upon boarding the train at Jackson, was warned by the flagman that the train did not stop at Ridgeland, and that he said he would get off at Tugaloo, or go on to Madison, and that the flagman permitted him to remain on the train upon that condition. It is evident that what passed between the flagman and Harris and Jackson was of no consequence, because the rights and duties of the parties were fixed by the ticket held by Harris: *Wells v. Alabama etc. R. R. Co.*, 67 Miss. 24, 6 South. 737.

We further think the right of Harris to return on No. 26 **215** was not affected by the statement of the agent at Ridgeland that, if the train was behind its scheduled time, he would experience difficulty in returning upon it; for he could not in that manner curtail or diminish the rights evidenced by the ticket which he was writing for the company. The uncontradicted proof was that No. 26 was on time, but, if it had not been on time, it would not have affected the merits of the controversy. Harris had a ticket for returning that day to Ridgeland, he entered the only train that could put him there on that day, and he was not a trespasser, but was rightfully thereon: *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. To sell Harris a coupon ticket to return on that day, and then to deny him the right to passage upon the only

train that could return him to his destination, would have operated as a palpable fraud upon him. We think his ticket gave him a right of passage on No. 26, and that his ejection was wrongful, and the instruction of the learned judge was not error.

The punitive damages imposed by the jury were not inflicted in consequence of the putting Harris off the train, but for insult and violence in so doing; and the question relating thereto was fairly submitted to the jury, and we do not understand counsel to challenge the instruction of the court or the finding of the jury in this respect.

The refusal of the court to grant to defendant its ninth and thirteenth requests for instruction to the jury is earnestly argued as matter of error; but, if the views expressed in the first part of this opinion are correct, their refusal was not error.

Affirmed.

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*A Passenger* must ascertain before boarding a train whether it stops at the station of his destination. If he does not do so, the railroad company is ordinarily under no obligation to stop at such station, contrary to its published schedule, *Schiffler v. Chicago etc. Ry. Co.*, 96 Wis. 141, 65 Am. St. Rep. 35, 71 N. W. 97. But if it contracts to take a passenger to a particular station, at which the train is required to stop under the regulations of the company, the passenger cannot be required to leave the train at a different station: *Sira v. Wabash R. R. Co.*, 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905.

*If a Passenger, through the Mistake of an Officer* or agent of the railroad company, is not furnished a proper ticket evidencing his right to be carried to his destination, his right still remains: *Kansas City etc. R. R. Co. v. Foster*, 134 Ala. 244, 92 Am. St. Rep. 25, 32 South. 773.

# ILLINOIS CENTRAL RAILROAD CO. v. GARRISON.

[81 Miss. 257, 32 South. 996.]

**EQUITY JURISDICTION—Consolidation of Suits.**—If several plaintiffs have separately sued the same defendant in actions at law for a continuing trespass, and his liability in each action, depends upon the same facts, equity has jurisdiction to enjoin the multiplicity of suits and have them consolidated in the same action. (p. 470.)

Bill to enjoin seven different plaintiffs from maintaining as many different actions at law against the same defendant for a continuing trespass based upon the same facts, and to have such actions consolidated in one suit. Decree below dissolving the temporary injunction on the ground of want of jurisdiction. Defendant appealed.

Mayes & Harris and J. M. Dickinson, for the appellant.

Brame & Brame and E. A. Howell, for the appellees.

**263** WHITFIELD, C. J. The case of Tribette v. Illinois etc. R. R. Co., 70 Miss. 182, 35 Am. St. Rep. 642, 12 South. 32, is a very different case from this one. There the damage resulted from a single past trespass, completed and over with; hence not to occur again in the future. The opinion of the court in that case expressly stated that the jurisdiction of the chancery court to enjoin, on the part of one, suits of many, or e converso, is maintainable where there is a "community of interest in the subject matter of the controversy," or where there "is" a common right or title." The case of Brinkerhoff v. Brown, 6 Johns. ch. 139, illustrates the exercise of the jurisdiction where there is a common right on the part of one against many, as does Pollock v. Okolona Sav. Institution, 61 Miss. 296, and these two cases are squarely in point. The case of City of Albert Lea v. Neilsen, 83 Minn. 246, 86 N. W. 83, is directly in point, also on the only question involved—whether the jurisdiction exists. **264** We do not now consider the merits of the case—we inquire only whether the chancery court has the jurisdiction; and the case in 83 Minn., 86 N. W. is directly in point on that proposition. The Tribette case holds that the jurisdiction is not exercisable, as maintained by Mr. Pomeroy, where the community of interest consists merely in the fact that the same question of law and similar questions of fact are involved in the several cases. We do not rest the exercise of the juris-



diction here on that proposition, but on the express holding in the Tribette case that the jurisdiction exists when there is "a common right or title," or "a community of interest in the subject matter of controversy." We hold that the jurisdiction is maintainable in this case for the following reasons: 1. This is not the case of a single past trespass, over with when it occurred, for all time, as was the Tribette case. The very first sentence in the brief of the learned counsel for appellant, in that case (*Tribette v. Illinois etc. R. R. Co.*, 70 Miss. 182, 35 Am. St. Rep. 642, 12 South. 33) shows that the very point on which that case turned was that the fire was a "single past trespass," and on page 183, 70 Miss., 35 Am. St. Rep. 642, and page 33, 12 South., the authorities are cited to that point, whereas here (a) there were some ten suits brought in 1899, some of which were compromised, and some of which were tried and won by the railroad; (b) there were twenty-three different claims propounded against the railroad in 1892, all represented by seven plaintiffs, who sued for themselves on their own seven claims, and also for the other claims which had been assigned to them; (c) it further appears that some of the plaintiffs in 1899 are also plaintiffs here, bringing new suits grounded on substantially the same state of facts; (d) the parties now suing expressly declare that they expect to bring new suits indefinitely in the future; (e) and they are all averred to be insolvent and unable to pay court costs. In every one of these cases—past, present, and future—the liability of the railroad company depends upon whether it has properly constructed <sup>265</sup> its railroad track. The determination of that question will settle all cases so long as the embankment remains unchanged in its condition. Here there is plainly a "common right" asserted by the railroad against all these various parties, and *Tribette v. Illinois etc. R. R. Co.*, in such case maintains the jurisdiction. Surely, on these facts, the jurisdiction of the chancery court to convene all the parties in one suit, and to determine therein the single question on which liability, past, present and future depends so as to prevent this endless multiplicity of suits with its attendant useless consumption of time and costs, is too well settled by modern authorities to be doubted: See authorities in brief of counsel for appellant, and in note of Mr. Freeman to *Woodward v. Seely*, 50 Am. Dec. at page 453. The case of *Pollock v. Savings Inst.* expressly maintains the equitable jurisdiction in this class of cases: See especially, pages 296, 297, 61 Miss. and authorities cited. This case falls squarely within Mr. Pomeroy's fourth class (sec. 255,

vol. 1, 2d ed.). Pollock v. Savings Inst. went far beyond Bishop v. Rosenbaum, 58 Miss. 84, as therein expressly pointed out: See especially, German Alliance Ins. Co. v. Van Cleave (1901), 191 Ill. 410, 61 N. E. 94; Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496.

Of course, we say nothing upon the merits of the case. That is for the chancery court on final hearing. We determine the only question now before us—that equity has jurisdiction of the case made by the bill below.

Decree reversed, injunction reinstated, and the cause remanded.

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*Injunction is a Proper Remedy* to prevent a multiplicity of suits, or to prevent a repeated and recurring cause of action: Stovall v. McCutchen, 107 Ky. 577, 92 Am. St. Rep. 373, 54 S. W. 969; South Covington etc. Ry. Co. v. Berry, 93 Ky. 43, 40 Am. St. Rep. 161, 18 S. W. 1026; Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74, and cases cited in the cross-reference note thereto. But equity will not entertain jurisdiction when the only object is to obtain a consolidation of actions or to save the expense of separate actions: Murphy v. Mayor etc. of Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345. A defendant sued for damages by several different plaintiffs, who have no community or tie connecting them, except that each has suffered by the same act of negligence, cannot enjoin them from prosecuting their actions separately at law, and compel them to obtain relief by a single suit in chancery: Tribette v. Illinois Cent. R. R. Co., 70 Miss. 182, 35 Am. St. Rep. 642, 12 South. 32.

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## HAYDEN v. STATE.

[81 Miss. 291, 33 South. 653.]

**OSTEOPATHY—Practice of Medicine.**—One who practices osteopathy and treats disease only by manipulation of the patient's limbs, muscles, ligaments and bones, does not practice medicine, nor is he required to obtain a license under a statute defining the practice of medicine as prescribing or directing for the use of any person any drug, medicine, appliance, or agency for the cure of disease or injury. (p. 473.)

J. A. P. Campbell and Boone & Curlee, for the appellant.

M. McClurg, attorney general, for the state.

**297** TERRAL, J. Hayden was indicted in the circuit court of Alcorn county for practicing as a physician without first

having been examined and obtained a license so to do. The facts of his alleged offense were admitted to be as follows, and upon this admission the case was submitted to the jury: "That the defendant practiced in this (Alcorn) county what is known as 'osteopathy' in the American School of Osteopathy, in Kirksville, Missouri, from which school he is a graduate. That in treating diseases, and in his treatment of the witnesses for the state in this case, to wit, W. W. Kemp and James A. Carter, he did not use any drug or medicine, but his treatment consisted of manipulating scientifically <sup>298</sup> the limbs, muscles, ligaments, and bones which were pressing on the nerves of the blood supply. This treatment was had so that nature would have free action. That in his treatment of diseases or pains he is confined solely to his manipulation as above described. That for said services to said Carter and Kemp he received pay. The witnesses were being treated for rheumatism, and claimed that they have entirely recovered, as a result of this treatment." The above is agreed as being all the facts in the case. The court instructed the jury that, if they believed the admitted facts, they should convict the defendant. This they did, and thereupon the court imposed a fine of twenty dollars upon the defendant. From this judgment he appeals.

The sole question is whether, under chapter 68, acts of 1896, an osteopath is required to be examined and licensed for the practice of his branch of the healing art. The act of 1896, so far as it is necessary to be known for the right understanding of this case, provides: "That the practice of medicine shall mean to suggest, recommend, prescribe, or direct for the use of any person, any drug, medicine, appliance or agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound or fracture or other bodily injury or deformity, or the practice of obstetrics or midwifery, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, profit or compensation." It is perfectly manifest, as we think, from the agreed statement of facts, that Hayden used neither drug nor medicine, as meant by the act of March 19, 1896. It is equally manifest to us that the legislature, by the use of the words "appliance and agency," did not intend to include such treatment as Hayden gave Carter and Kemp. Our attention has been called to no statement of osteopathic treatment in all the literature upon this subject

which characterizes the treatment of an osteopath of his patient as an appliance or agency. There is an incongruity <sup>299</sup> in such application of such words. Osteopaths themselves do not speak of their manipulation of the nerves, ligaments, bones, and other parts of the human body as being agencies or appliances of any sort or in any sense. In any strict and proper use of such words, they cannot be so denominated. If one not an osteopath directs a blow at their art, it is becoming that he use a term of description not to be mistaken. We conclude that the act of March 19, 1896, was not intended to regulate the practice of osteopathy in Mississippi. The course of study and examination prescribed in our law upon this subject seems to mark it out as a curriculum of the allopaths. It at least suits them in many respects, but its chemistry and materia medica are not specially adapted to assist the practice of osteopathy. They make no use of the immense learning contained on these subjects, so highly valued by the regular physician. It appears to us that our legislation upon the subject of the practice of medicine has been framed by the allopaths to suit their views of the medical art, and with the laudable design of excluding from the practice the unskillful and the ignorant; and it was not intended to set up a universal standard of therapeutics, from which none could depart. Courts in other jurisdictions where similar statutes prevail, have led the way for our decision in this case. While our own views of the subject would probably have led us to the conclusion we have reached, yet, if the case had been otherwise, we should have felt ourselves strongly constrained by the authority and reasoning employed by them. We refer to *State v. Liffing*, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168; *State v. Mylod*, 20 R. I. 632, 40 Atl. 753; *Nelson v. State Board*, 108 Ky. 769, 57 S. W. 501. Alabama, with a statute widely different from ours, holds another view. But *Bragg v. State*, 134 Ala. 165, 32 South. 767, sheds no light upon the construction of our statute.

A wise legislature some time in the future will doubtless make suitable regulations for the practice of osteopathy, so as <sup>300</sup> to exclude the ignorant and unskillful practitioners of the art among them. The world needs and may demand that nothing good or wholesome shall be denied from its use and enjoyment.

The judgment below is reversed, the indictment quashed, and the defendant discharged.



*An Osteopathist* does not practice medicine in contravention of a statute forbidding anyone, without a certificate of qualification, to prescribe for the use of another "any drug, or medicine, or other agency": *State v. Lifferring*, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168. But see *People v. Gordon*, 194 Ill. 560, 88 Am. St. Rep. 165, 62 N. E. 858; *State v. Gravett*, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325.

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## BOOKER v. STATE.

[81 Miss. 391, 33 South. 221.]

**CRIMINAL TRIALS**—**Right of Accused to be Present.**—If, on a murder trial, a witness for the prosecution is partially examined in the absence of the accused, when all proceedings are stopped, the presence of the accused procured, the evidence taken in his absence excluded and the jury instructed to wholly disregard it, whereupon, against the objections and exception of the accused, the witness is re-examined, testifying substantially as he had done in the absence of the accused, the action of the court is fatally erroneous, and the accused, upon conviction, is entitled to a new trial. (pp. 474, 475.)

J. W. Cutrer, for the appellant.

W. Williams, assistant attorney general, for the state.

**395 CALHOON, J.** On the reassembling of the circuit court after the noon recess, the examination of a state witness was resumed in the absence of the prisoner, who was on trial on an indictment for murder. The testimony of this witness, who saw the homicide, was quite important, and his examination in chief lasted for a time sufficient to take up three pages of type-written record paper for the transcription of the notes of the stenographer. The examination in chief of the witness was concluded by the state, and three questions had been asked him by counsel for the prisoner, when the court discovered that the accused was not present, and thereupon the presiding judge stopped the proceedings until the sheriff brought him from the jail. Then the court told the jury not to consider anything said by the witness in the absence of the prisoner, and directed the trial to proceed, over the objection of the prisoner, who excepted, and the witness was re-examined de novo and cross-examined, giving substantially the same testimony as he had delivered in the absence of the defendant. This action of the court is one of the grounds of a motion for a new trial filed by the prisoner, which motion was overruled, and in this we think

396 there is fatal error. The prisoner had the constitutional right to be present, and formerly it was uniformly held that a conviction was void unless the record affirmatively showed his presence. Now, under the statute, his presence is presumed, unless, as in this case, the record shows his absence. The authorities cited in the brief of counsel for appellant are conclusive of the question. The attorney general, with commendable frankness and fairness, concedes it, and, with a proper and high conception of his real duty as an officer, himself produces a case, the facts of which are precisely the same as in the case before us: *State v. Greer*, 22 W. Va. 801. In that case the court said: "We will not inquire whether the prisoner was unfavorably or otherwise affected by the cross-examination of the witness in his absence. He had the right to be present, which he did not and could not waive. He had the right to observe every look, gesture, or movement of the witness while he was testifying, and it matters not that the court excluded the evidence and certified that it was repeated in his presence." In the case in hand we think the court below should have offered to the prisoner that a mistrial should be entered, and a venire de novo ordered. If this had been done and refused, perhaps the trial might well have proceeded, but that case is not before us. As it is, the new trial should have been granted.

Reversed and remanded for a new trial.

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*The Accused* in felony cases has a right to be present at all times in the course of his trial when anything is said or done affecting him as to the charge against him in any material respect: *State v. Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299, 2 S. E. 185; *State v. Mannion*, 19 Utah, 505, 75 Am. St. Rep. 753, 57 Pac. 542; notes to *Fight v. State*, 28 Am. Dec. 629-631; *Warren v. State*, 68 Am. Dec. 219-228. As to his right to be present at proceedings other than the trial, see *State v. Young*, 50 W. Va. 96, 88 Am. St. Rep. 846, 40 S. E. 334; *State v. Warner*, 165 Mo. 399, 88 Am. St. Rep. 422, 65 S. W. 584; *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; *State v. Jacobs*, 107 N. C. 772, 22 Am. St. Rep. 912, 11 S. E. 962. His right is not violated when he steps into an anteroom for five minutes some fifteen or twenty feet distant to telephone to a witness, against the objection of the district attorney, and during his absence his counsel continues the cross-examination of a witness: *People v. Bragle*, 88 N. Y. 585, 42 Am. Rep. 269.

## BALLARD v. MISSISSIPPI COTTON OIL COMPANY.

[81 Miss. 507, 34 South. 533.]

**CONSTITUTIONAL LAW—Severance of Statutes.**—Whenever the court finds on the face of a statute a number of different provisions, some constitutional and some not, it may sever them if they are not interdependent, striking out the unconstitutional provisions and allowing the valid ones to stand. This is what is meant by the severance of a statute; but whenever a court, in order to uphold the constitutionality of a statute, has to interpolate therein provisions not put there by the legislature, this is no case of severance nor a proper limitation of the provisions which are in the statute by judicial construction. Such action is nothing less than pure judicial legislation, and this cannot be defensible. (p. 492.)

**CONSTITUTIONAL LAW—Employer's Liability Act—Special Legislation.**—A statute providing that every employé of any corporation shall have the same rights and remedies for an injury suffered by him from an act or omission of the corporation or its employés as are allowed by law to other persons not employés, where the injury results from the negligence of a superior agent or officer, or of a person having the right to direct or control the services of the person injured, and also when the injury results from the negligence of a fellow-servant, and that knowledge of defective appliances by the person injured shall constitute no defense and that the provisions of the statute shall not be waived by contract, is unconstitutional, because it imposes restrictions on all corporations without reference to any difference arising out of the nature of their business, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the laws. (p. 499.)

R. N. Miller and Campbell & George, for the appellants.

Smith, Hirsh & Landan, for the appellee.

555 WHITFIELD, C. J. We are clearly of the opinion that the stepladder furnished the deceased employé, John W. Ballard, was a wholly unsafe and dangerous appliance; but it is equally clear that he had knowledge of its dangerous character. Under the common law his suit would, therefore, fail; but he sues under the provisions of the act of 1898: Laws 1898, p. 85, c. 66. Section 1 is amendatory of chapter 87 of the laws of 1896 (Laws 1896, p. 97), which itself is amendatory of section 3559 of the code of 1892, which is a mere rescript of section 193 of the constitution of 1890.

Section 193 is in these words: "Every employé of any railroad corporation shall have the same rights and remedies, for any injury suffered by him from the act or omission of said corporation or its employés, as are allowed by law to other persons not employés, where the injury results from the negligence of a

superior agent or officer; or of a person having the right to control or direct the services of the party injured; and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about another piece of work. Knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors, or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employés, the legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by an employé to waive the benefit of this section, shall be null and void; and this section shall not be construed to deprive any employé of a corporation, or his legal or personal representative, of any legal right or remedy that he <sup>556</sup> now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employés."

Section 1 of the act of 1898 (Laws 1898, p. 85, c. 66) is as follows: "Section 1. Be it enacted by the legislature of the state of Mississippi, that section 3559 of the annotated code of 1892 be amended so that the same shall read as follows, to wit: Every employé of any corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employés as are allowed by law to other persons not employés, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured; and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers, in charge of dangerous or unsafe cars, or engines voluntarily operated by them. When death ensues from an injury to an employé an action may be brought in the name of the widow of such employé for the death of the husband, or by the husband



for the death of his wife, or by the parent for the death of a child, or in the name of the child for the death of an only parent, for such damages as may be suffered by them respectively by reason of such death, the damages to be for the use of such widow, husband or child, except that in case the widow should have children the damages shall be distributed as personal property of the husband. The legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. In every such action the <sup>557</sup> jury may give such damages as shall be fair and just with reference to the injury resulting from such death to the person suing. Any contract or agreement, expressed or implied, made by any employé to waive the benefit of this section shall be null and void; and this section shall not deprive an employé of a corporation, or his legal or personal representative, of any right or remedy that he now has by law."

The only effect of the amendment of section 3559 of the code of 1892 is to substitute the words "any corporation," in section 1 of said act of 1898, for the words, "a railroad," in section 3559, and to add, in section 1 of the act of 1898, this clause, "or of the improper loading of cars."

Section 193 of the constitution of 1890 was adopted after the decision of the United States supreme court in *Missouri R. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, in 1888, and was manifestly intended to authorize legislation along the lines held constitutional in that case—that is to say, to abolish the fellow-servant rule in the case of employés of railroad corporations whose business was known to be inherently dangerous—and the purpose of the last clause of section 193 was to extend the remedies therein provided for to any other class of employés of corporations or persons whose business was, like that of railroads, inherently dangerous, or whose business was so different from the business of other corporations or persons as to furnish the basis for a classification of the businesses of such corporations or persons, under which their employés might be permitted to sue without reference to the fellow-servant rule, while the employés of corporations, or persons not having that sort of business, could not so sue; in other words, to permit a classification based on "some different bearing a reasonable and just relation to the act in respect to which the classification is proposed": *Ellis' Case*, 165 U. S. 150, 17 Sup. Ct. Rep. 255. The use of the word "class," in the last clause of section 193 of the constitu-

tion of 1890, clearly indicates that it was not the <sup>558</sup> purpose of the section to extend its provisions to all employés of all persons or corporations, but only to such employés of persons or corporations as operated business between which and the business of all other persons or corporations there exists some difference—some substantial difference—such as would be held a warrant for a classification conferring upon such employés of the first class, and denying to employés of the latter class, the benefits of section 193 of the constitution. The thought was that a classification might be made, giving to the employés of some corporations and of some persons the right to recover, and denying it to the employés of all other corporations and persons, provided that classification was based upon some distinctive difference between the kinds of business conducted by the one set of corporations or individual employers. Section 193 was itself a special classification of railroad employés, based on the known hazardous character of the operation of railroad cars. It was the direct product of the Mackey case, *supra*. It is not, therefore, to be supposed that the last clause of the section meant any more than that there might be other classifications of the employés of corporations or individual persons, based also on some distinguishing difference in the nature of the businesses. We do not understand the supreme court of the United States, in its many decisions on this subject, to mean that the dangerousness of a particular business would be the only basis for distinguishing between the business of corporations or individual employers in the classification, but rather that any substantial difference between particular businesses which would serve as a reasonable basis for a classification, allowing the employés in the one case to recover, and in the other case not, is sufficient. This we understand to be the doctrine of the Ellis Case, 165 U. S. 150, 17 Sup. Ct. Rep. 255, and of *Magoun v. Illinois etc. Co.*, 70 U. S. 293, 18 Sup. Ct. Rep. 594, and of *St. Louis etc. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. Rep. 419, in which last case the difference was held to <sup>559</sup> consist in the fact that the corporation was engaged in a public business, and that the public character of that business made a sufficient difference for upholding that statute. Whilst this case seems an extension of the doctrine of the Mackey case, it is clearly an application of the same principle. Neither held that the employés of all could be given this right to recover. One held that the employés of a railroad corporation might be given the right to recover because of the dangerous character

of that business; the other, that the employés might recover, under the Arkansas statute involved, because "of the fact that the corporations [railroad] were clothed with a public trust, and discharged duties of public consequence affecting the community at large," it being said, following the supreme court of Arkansas, "that the regulation, as promoting the public interest in the protection of employés, to the limited extent stated, was properly, in the power to amend, reserved under the state constitution." It will be observed that this decision is criticised as pressing the doctrine beyond its utmost legal tension, in a note of Mr. Freeman to this same case at the top of page 181, 62 Am. St. Rep.; but the criticism should be rather of the supreme court of Arkansas than of the United States supreme court, as we shall show later herein.

The act of 1898, under review, is assailed as violating the fourteenth amendment of the constitution of the United States, because it denies, as alleged, to corporations the equal protection of the laws in two respects: 1. In that it applies to the employés of all corporations, without reference to any differences in the respective businesses of the corporations; 2. Because it discriminates between employés of natural persons and of corporations—and the argument is put briefly thus by way of illustration: "Suppose one man has an independent fortune, and has a large body of pine land, say in Clarke county, Mississippi, and being desirous of converting the timber upon these lands into lumber and recognizing that the sawmill business is hazardous and likely to impose large liability upon 560 him, he incorporated this business under the name of the Clarke County Sawmilling Company. Alongside of him and his property in Clarke county is an individual owning an equal body of land, who does not see fit to take this precaution. Suppose the boilers of these two sawmills are notoriously weak, and all the employés of both parties are aware of it, and yet they continue to work. Suppose, now, at the same time and from identically the same cause, a boiler explosion takes place in both mills. The Clarke County Sawmilling Company would, under the act of 1898, be mulcted in damages, but the individual would not be liable." And it is urged that the act applies to all corporations, but to no natural persons, and, since the natural person and the corporation might be both engaged in precisely the same business, a discrimination in such cases does not rest on any difference in the business. Possibly the clearest statement of the doctrine contended for by appellee is that

stated in *Soon Hing v. Crowley*, 113 U. S. 708, 709, 5 Sup. Ct. Rep. 733, as follows: "The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law." In the *Ellis* case, *supra*, it is said that the classification must always rest upon "some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily."

Multiplied citations from the United States supreme court could be made, but the thought running through them all, as we understand them, clearly is that the classification is not to be made, except upon the basis of some difference between the business of those favored and the business of those not favored—a substantial difference warranting the classification. We have read critically all the decisions cited in the briefs from the United States supreme court without finding any decision holding <sup>561</sup> expressly that a statute providing that the employes of all corporations may so recover can be upheld. We have read carefully, also, the decisions from the state supreme courts cited, and others not cited, by counsel. We will quote briefly from a few of these to show that the line of distinction is the one we have indicated.

In *Holden v. Hardy*, 169 U. S. 393, 18 Sup. Ct. Rep. 388, the court says: "While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the constitution, for the protection of the operatives; but in the vast proportions which these industries have since assumed it has been found that they can no longer be carried on with disregard of the safety and health of those engaged in them, without special protection against the dangers necessarily incident to those employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to those dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings, a municipal inspection of boilers and appli-



ances designed to secure passengers upon railways and steamboats against dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact; for the cleanliness and ventilation of working rooms; for the guarding of well holes, stairways, and elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escape-ment shafts, means of signaling the surface for supply of <sup>562</sup> fresh air, and the elimination, as far as possible, of the dangerous gases; for safe means of hoisting and lowering cages; for a limitation upon the number of persons permitted to enter a cage, and that cages shall be covered; and that there shall be fences and gates around the top of shafts, besides other similar precautions. . . . These statutes have been repeatedly enforced by the courts of the several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional."

All the instances set forth here illustrate the principle that the discrimination in favor of certain employés is always based upon some distinctive difference in the business about which they are employed—a difference inhering in the very nature of the business.

In the case of *Smith v. Louisville etc. R. R. Co.*, 75 Ala. 449, the court says: "This statute creates an entirely new cause of action—one theretofore unknown. Before its enactment—February 24, 1872—neither the father nor the mother could recover damages for such killing. Not only does the statute create a new cause of action, but it confines the right to maintain such a suit to the father, if living, and, if not, to the mother. If neither be living, no one else can maintain the suit. And the statute is highly penal in its terms, and must be construed as a penal statute. Is the act copied above constitutional? It will be observed that under the statute the action lies only against certain classes—corporations and private associations of persons. These are held accountable for the wrongful acts and omissions of their officers and agents. Individuals engaged in the same business, having the same description of officers or agents, may cause the death of a minor child by the wrongful act or omission of such officer or agent, and there will be no liability for such death. To illustrate:

Manufacturing establishments, in all their extensive variety, mining enterprises, cotton compresses, mills, steam vessels, and even railroads, may be owned and operated without incorporation, <sup>563</sup> and by a single proprietor. These are not within the law; and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither the father nor the mother can maintain a suit. If, however, there be more owners than one, or if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother, if he be dead. This precise difference the statute makes, although the character of business and the wrongful act or omission of the agent be in each case the same. How this will work will readily suggest itself. If the employer, being a single individual, be not responsible for the wrongful act or omission of the agent he employs, how can the same act by the same agent employed under the same circumstances, impose a penalty on the innocent employer, merely because two or more owned the business and united in employing the agent? If so, on what principle? Is individual enterprise less amenable to legislative surveillance than associated capital? Within the last twenty years very important constitutional provisions, federal and state, have been adopted. Article 14 of the amendments to the constitution of the United States declares (section 1) that 'no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.' Speaking of this provision, Justice Field, of the United States supreme court, in *County of San Mateo v. Southern Pac. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 1, said: 'It not only implies the right of each to resort on the same terms with others to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens of charges than such as are equally imposed upon all others under like circumstances': 8 Am. & Eng. R. R. Cas. 1-11, 8 Saw. 238, 13 Fed. 722. In the case of *Deppe v. Chicago etc. Ry. Co.*, 36 Iowa, 54, the court says: 'The defendant asked the court to instruct the jury that the plaintiff, in view of his employment (shoveling dirt at a bank) <sup>564</sup> at the time of his injury, was not within the purpose and meaning of the act, and hence they should find for the defendant. This was refused, and thereon arises the first assigned error. It was said in the case of *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338, which was an action by the administratrix of a brakeman:

"If there is an employer and employé, but no business of a railroad company to be engaged in, then the case is not within the act. But the same liability is extended by the act, upon the same terms, to all in the same situation." And in another case, decided on the same day (*Ney v. Dubuque etc. R. R. Co.*, 20 Iowa, 347), it was held that "in connection with railroads, the term 'employé' applies to the conductors, agents, superintendents, and others engaged in operating the road, and the like, and not to contractors or persons building or constructing the roadbed, or laying down the ties and rails." It was under this construction of the language of the statute that it was held constitutional, as before explained.' But if the statute could be so construed as to apply to all persons in the employ of railroad corporations, without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate: Suppose a railroad company employ several persons to cut timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut timber on a strip of equal length alongside of such right of way. If one of each set of employés shall be injured by the negligence of a coemployé, and the employé of the railroad company can, under the statute, maintain an action against his employer, and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have uniform operation, but would be violative of the constitution, just as much as a law that should prescribe, under the same circumstances, different liabilities for merchants, for 565 mechanics and for laborers. The manifest purpose of the statute was to give its benefits to employés engaged in the hazardous business of operating railroads. When thus limited, it is constitutional; when extended further, it becomes unconstitutional."

We must confess that the argument upholding the constitutionality of the statute before us is exceptionally able, and presents many objections to the view we have stated, but objections all of which we think answerable. For example, it is said, first, that, since the act of 1898 is amendatory of section 3559 of the code, the court would be warranted in limiting the words "any corporation" to such corporations as, like railroads, are engaged in a hazardous business. The argument is

that, since section 3559 applies alone to railroads, and since the only pertinent amendment is the change of the words "a railroad" into the words "any corporation," the act retaining bodily the language used in section 3559 as applicable to railroads only, the act of 1898 must mean, in the use of the words "any corporation," any corporation ejusdem generis with railroad corporations—corporations of that kind, whose business is hazardous. But the complete answer to this very ingenious suggestion is that the method of amending a statute has been changed by section 61 of the constitution, so as to make the whole of the law on the subject appear in the amendment; so that the only form in which we have section 3559 is in section 1 of said act of 1898. The language is that "section 3559 of the code of 1892 be amended so that the same shall read as follows, to wit: Every employé of any corporation," etc. Section 3559 does not exist in the body of our law, except as set out in section 1 of the act of 1898. Another objection to this view is that it would have been extremely easy, if such had been the legislative purpose, to have said, "Every employé of any corporation whose business is inherently dangerous." We think we must read the language as the legislature has written it, and, so read, the legislature clearly meant to extend the <sup>566</sup> remedy to the employés of all corporations, without reference to any distinction existing between the different business of corporations.

2. In respect to the cases of *Pittsburg etc. R. R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582, and *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136, it is very earnestly insisted that *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 350, 20 Sup. Ct. Rep. 136, upholds the view that a statute like this, applicable to all corporations, is not unconstitutional; and it is said that these two cases further uphold the view that the court may, by a process of judicial inclusion and exclusion, look to the evidence in each case to determine in that way—from the evidence, showing the nature of the business—whether any particular corporation falls within or without the constitutional line of demarkation. This argument for appellant is put with such clearness and power that we do not think the presentation could be improved upon, and so we quote it entire. Says learned counsel:

"The mere fact that natural persons are not included in the act does not render it obnoxious to the provisions of the fourteenth amendment. If so why does the supreme court, in the



case of *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136, uphold almost a similar statute as to railroads? The language of the Indiana act was 'railroad and other corporations.' It did not include individuals. There are a number of individuals in the United States who have the means to operate railroads, and doubtless there are instances where railroads are owned and operated by individuals; yet the supreme court of the United States, in the above cited case, holds such legislation as is under consideration now not in contravention of the constitution. The illustration of opposing counsel will apply just as forcibly to an individual operating a railroad as it does to a sawmill and commercial corporation. The case of *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136, is, we think, in point to uphold <sup>567</sup> the constitutionality of the act under consideration. While the court does use the language that, considering the act of Indiana as applying only to railroad corporations, it cannot be regarded as in conflict with the fourteenth amendment, yet it is evident that the court intended to convey the idea that it was not called upon to consider it, except so far as railroad corporations were concerned, and it is not to be taken at all as an intimation that it would hold the act of Indiana unconstitutional as to other corporations. The only ground upon which counsel attacks the act of 1898 is that it does not extend its provisions to natural persons, and therefore it is class legislation; and the court, in its order remanding the case, seems to intimate that the fact that natural persons are not included in the act would render it unconstitutional, as it applies to all corporations and to no natural persons. But on this point the case of *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136, it seems to me, is decisive. If the fact that the omission from the act of natural persons would render the act in conflict with the fourteenth amendment, then the court would have said that the act imposed liabilities and restrictions upon corporations operating railroads, but did not impose the same liabilities and restrictions upon natural persons operating railroads, and was therefore unconstitutional. If the addition of the words 'natural persons' to the act of 1898 under consideration would make it consistent with the provisions of the fourteenth amendment, as the court would seem to think, and counsel for appellee undoubtedly think, then the omission of the words 'natural persons' from the Indiana act construed in *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136,

should certainly have rendered the Indiana act obnoxious to the fourteenth amendment; yet the supreme court of the United States did not so hold. It seems to me there is no escape from this argument. . . . At first thought I was impressed with the fact that it was absurd to make the constitutionality of the act depend upon the evidence deduced in each particular case; but after considering <sup>568</sup> the matter I have come to the conclusion that that is what the court or legislature does when it says, as it did in *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136, that the business was dangerous. The act simply says 'railroad corporations,' and the court says that the legislature had the right to restrict such corporations in their dealings with their employés, because of the dangerous and hazardous character of the employment and business in which such corporations are engaged. But how do you know that railroad corporations are engaged in a dangerous and hazardous business? You must know it either as a matter of general knowledge or from the testimony of witnesses in any particular case. If the court takes cognizance from general knowledge that a railroad corporation is engaged in a dangerous and hazardous business to its employés, why can it not take notice from general knowledge that a corporation engaged in the manufacture of oil from cotton seed, or of furniture from various woods, is engaged in a hazardous business? If the court does not know this of its own general knowledge, what is the objection to ascertaining it from the facts of each particular case as testified to by witnesses? It would be impossible for the legislature to have enumerated, *eo nomine*, each and every corporation to which it is intended the act should apply. If it did not do this, then there were only two courses to pursue: To say 'all corporations using the dangerous agency of steam in operating its machinery.' Then the court would have to take cognizance from general knowledge that any specific corporation, from its name or the character of its business, used steam in operating its machinery, or else would have to inform itself as to this from testimony of witnesses in any given case. If the legislature should pursue the only other course, to wit, of saying 'any corporation,' and the court should deem that there might be some corporation to which it would be unconstitutional to apply such an act, then what is the objection to determining, either from general knowledge or the specific testimony of witnesses, <sup>569</sup> that such corporation falls within the terms of the act, constitutionally or unconstitutionally, according to the fact whether

or not it is engaged in a business hazardous and dangerous to its employés?"

We, however, think the meaning of the Tullis case is distinctly that, if the Indiana statute had not had in it, on its face, the words "railroad corporations," it would have been held by the supreme court of the United States unconstitutional. It is true the objection in that case was made that it was unconstitutional because the language, "railroad corporations and other corporations," was exactly equivalent to the words, "all corporations," which would present a statute just like ours. But it is to be distinctly noted that the Indiana supreme court held, and the United States supreme court counted on that holding, that that objection could not be made by a railroad company; in other words, the Indiana supreme court declined to entertain the objection, since the party making the objection was a railroad corporation, and the supreme court of the United States accepted the state supreme court's construction of its state's statute. The words "railroad corporation" appearing also on the face of the statute, as to the objection that individuals own railroads, and that consequently the supreme court of the United States, in Tullis case, *supra*, must be assumed to have held that such legislation is valid, though applying to corporations owning railroads, and not to individuals owning railroads, although both are in exactly the same business, we must confess that it is extremely difficult to make answer for the supreme court of the United States. It may be that the instances of individual ownership of interests so vast as railroad interests usually are, are so very rare as not to have been thought worthy by the supreme court of the United States of special consideration, though this surely ought not to affect the principle. At all events, it is too plain for debate that in all the decisions of the federal supreme court the ground on which such legislation as this has been vindicated in some essential <sup>570</sup> and substantial difference between the businesses of the corporations favored and the businesses of the corporations discriminated against.

3. But the most difficult proposition to answer, made by learned counsel for appellant, is this: That the supreme court of the United States, in *Chicago R. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. Rep. 585, held that, in severing the unconstitutional from the constitutional parts of a statute, a court may, although the language of the statute clearly embraces all corporations, affect such severance by looking to the evidence in each particular case, and thus "judicially excluding or in-

cluding" a particular corporation, according as the evidence in each case may show that the business of such corporation does, or does not, bring it within the purview of the statute. The statute of Kansas in that case is as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employé of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers, or employés, to any person sustaining such damages." And the court said: "It is now contended that the plaintiff was a bridge builder; that this legislation only applied to employés exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad could not be subjected to any greater liability to its employés who were engaged in building its bridges than any other private individual or corporation engaged in the same business; and that the statute had been so construed in this case as to make the company liable to its employés when engaged in building its bridges, notwithstanding bridge building was not accompanied, and had not been treated by such legislation as accompanied, by peculiar perils, thus discriminating against the particular corporation, irrespective of the character of the employment, in contravention of the fourteenth amendment. But the difficulty with the argument is that the supreme court found upon the facts that, <sup>571</sup> although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge, but in loading timber on a car for transportation over the line of defendant's road; and *Missouri Pac. R. R. Co. v. Haley*, 25 Kan. 35, *Union Pac. R. R. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571, and *Atchison etc. R. R. Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567, were cited, in which cases it was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car, a section-man employed by a railroad company to repair its roadbed, and to take up old rails out of its track and put in new ones, and a person injured while loading rails on a car to be taken to other portions of company's road, were all within the provisions of the act in question, and the court said: 'In this case the plaintiff was injured while on a car assisting in loading timbers to be transported over defendant's road to some other point. The mere fact that the plaintiff's regular employment was a bridge carpenter does not affect the case, nor does it matter that the road was newly constructed, or whether



it was in regular operation or not. 'The injury happened to the plaintiff while he was engaged in labor directly connected with the operation of the road, and the statute applies, even though it should be given the construction counsel places on it.' And see *Chicago etc. R. R. Co. v. Stahley*, 62 Fed. 363, etc., 11 C. C. A. 88."

It is certainly true that in the cases cited from Kansas, as also the case we have heretofore referred to of *Deppe*, supra, and also in the two cases of *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338, and *Ney v. Dubuque etc. R. R. Co.*, 20 Iowa, 347, the court did look to the evidence to see whether the person suing was or was not an employé, and further whether, though an employé, he was such an employé as was actually engaged at the time in the operative service of the railroad—that is, service connected with the running of the cars. It might be said that the thing which distinguishes that <sup>572</sup> statute from ours is that in the Kansas statute and the Iowa statute the words "railroad company" appear on the face of the statute, and that in all these cases from Kansas and Iowa the courts had, therefore, statutes on the face of which the words "railroad company" appeared, and that as the court judicially knew that the business of railroading was a hazardous business, inherently such, and as the statute was hence the exact equivalent of a statute framed thus, "Every employé of any corporation or individual whose business is inherently dangerous," therefore all the court did was to see, from the evidence, whether the employé was an employé of a railroad corporation—that is, equivalently, of a corporation whose business was inherently dangerous. In other words, those courts might say—and this would be the controlling thought on that view—that they found the boundary by which to sever in the language of the statute itself, "railroad company," and all that they looked to the evidence for was to be sure that the particular employé was an employé of the kind of corporation named in the statute; and hence those courts would say that in none of these decisions did the court sever the unconstitutional provisions of the statute from the constitutional by looking to the evidence, but solely by the words "railroad company" found on the face of the statutes.

We have said that above line of thought might be indulged in for the purpose of supporting the decisions of the supreme courts of Kansas and Iowa in the construction of their statutes. And we may say that that line of thought might also be in-

voked in the hope of supporting the following cases: *Leep v. St. Louis etc. R. R. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109, 25 S. W. 75; *St. Louis etc. Ry. Co. v. Paul*, 64 Ark. 83, 62 Am. St. Rep. 154, 40 S. W. 705; and also *Minneapolis etc. R. R. Co. v. Herrick* (from Minnesota, affirmed), 127 U. S. 210, 8 Sup. Ct. Rep. 1176; and *Chicago R. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. Rep. 585, <sup>573</sup> affirmed from the supreme court of Kansas. But, with all deference, it is impossible for us to regard any of these decisions as sound on this point. The court did not, in those cases, sever the statute, so as to divide constitutional provisions from unconstitutional provisions. The act of the court in each and every one of these cases was distinctly not a severance of a statute, separating constitutional from unconstitutional provisions in the statute, all of the provisions appearing upon the face of the statute. The act of the court was an alleged judicial limitation of general words in a statute, by the evidence in each case, so as to hold one employé within and another employé without such general words. Limitation by judicial construction is not severance of a statute. Severance of a statute takes place only where both sets of provisions, constitutional and unconstitutional, appear upon the face of the statute itself, and the court separates, if the provisions are not interdependent, the constitutional from the unconstitutional, and strikes from the statute the unconstitutional provisions, leaving the constitutional provisions in the statute. But where, as in all these cases, there are just two general words, "any employé," what the court does is simply to look to the evidence in each case, and from that evidence determine, not from the provisions on the face of the statute, whether the particular employé is or is not the kind of employé falling within the supposed, not the declared, intent of the act, that furnishes a case, not for a severance of a statute, but for the limitation, by alleged judicial construction of general words, by the evidence in the case. We say alleged judicial construction. We think it is judicial legislation. The latter—that is to say, the so-called limitation by judicial construction; judicial legislation as we conceive it—is never permissible. And hence we think all the decisions we have referred to on this point clearly unsound. The difficulty is in finding the true test as to when a statute may be severed. That test clearly is this: That whenever the court finds on the face of a statute a number of different provisions, <sup>574</sup> some constitutional and some unconstitutional, there it may sever, if they be not interdependent, between these

provisions, striking out the constitutional; and, let it be marked, that in every such case there is something to sever between on the face of the statute. That is what is meant by the severance of a statute. But wherever a court, in order to uphold the provisions of a statute as constitutional, has to interpolate in such statute provisions not put there by the legislature, in order, by such interpolation, to make the provision which the legislature did put there constitutional, this is no case case of severance in any proper legal sense; nor is it in any legal or logical sense a proper limitation of the provisions which are in a statute by judicial construction. Such action by a court is nothing less than judicial legislation pure and simple.

That we have stated the true test clearly appears from two decisions of the United States supreme court: The first, *United States v. Reese*, 92 U. S. 214, where the court say, as to the test of severance of a statute, "The proposed effect is not to be attained by striking out, or disregarding the words that are in the section, but by inserting those which are not now there. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside, and say who could be rightly detained, and who could be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." And consult carefully the cases cited, referring to the *Reese* case, set out in *Rose's Notes* at page 789. The other case, not referred to by any of the counsel is the case of *Baldwin v. Franks*, 120 U. S. 685-690, 7 Sup. Ct. Rep. 656, 763, to which we call critical attention. The court say: "In *United States v. Harris*, 106 U. S. 629, 1 <sup>575</sup> Sup. Ct. Rep. 601, it was decided that this section was unconstitutional, as a provision for the punishment of conspiracies of the character therein mentioned, within a state. It is now said, however, that in that case the conspiracy charged was by persons in a state, against a citizen of the United States and of the state, to deprive him of the protection he was entitled to under the laws of that state, no special rights or privileges arising under the constitution, laws, or treaties of the United States being involved; and it is argued that, although the section be valid so far as such an offense is concerned, it is good for the punishment of those who conspire to deprive aliens of the rights guaranteed to them

in a state by the treaties of the United States. In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional, and in part unconstitutional, and that, under some circumstances, the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional, and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character; for in that connection it has no parts, within the meaning of the rule. Whether it is separable, so that it can be enforced in a territory, though not in a state, is quite another question, and one that we are not now called on to decide. It provides, in general terms, for the punishment of all those who conspire for the purpose of depriving any person, or any class of persons, of the legal protection of the laws, or of equal privileges or immunities under the laws. A single provision [like the two words in this statute], which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the constitution, laws, or treaties of the United States. The limitation <sup>576</sup> which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.”

This language is decisive of the unsoundness of the view taken by the supreme courts of Iowa, Kansas, Arkansas, and Ohio, cited above. But, it may be said, were not all these cases affirmed by the supreme court of the United States? Certainly. But why? That is made extremely plain by the supreme court of the United States in *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136, and *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. Rep. 518. Chief Justice Fuller in the former says the supreme court of the United States accepted the construction of the Arkansas supreme court “because that court had so decided,” and also distinctly says that the decision of the supreme court of Indiana in *Pittsburg etc. R. R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582, was affirmed because the supreme court of the United States was bound to accept the construction put upon an Indiana statute by the supreme court of Indiana. The very point expressly argued in the *Tullis* case was that



the supreme court of the United States should hold the Indiana statute unconstitutional, notwithstanding the decision on the Kansas, Iowa, and Ohio statutes, because of the particular phraseology of the Indiana statute; but Chief Justice Fuller said that that view asked the United States supreme court "to disregard the interpretation of a state statute by the court of last resort of a state, and, by adverse construction, to decide that the state law was repugnant to the constitution of the United States. But," said the chief justice, "the elementary rule is that this court accepts the interpretation of a statute of a state affixed by the court of last resort thereto." And so, in *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. Rep. 518, the court was asked to apply the doctrine of the *Reese*, *Harris*, and *Franks* cases to the Texas statute, and hold it violative of the fourteenth amendment. This statute provided: "Every foreign corporation <sup>577</sup> violating any of the provisions of this act," etc., just as the Kansas and other statutes had said "railroad corporations" should be liable to all their employés, without reference to whether engaged in its operative service or not. The Texas court of civil appeals held that they could separate this language, "any of the provisions of this act." into such provisions as related to local commerce, and such as related to interstate commerce, and so upheld their act. Clearly this was no severance of the act. It was putting into the act words not there. It was determining by the evidence in each case, whether the commerce was local or interstate. And hence the earnest insistence for the application of the doctrine of the *Reese* and other cases cited above. But what was the reply of the United States supreme court? That in those cases the interpretation of certain statutes of the United States was involved, and that the supreme court of the United States, interpreting them and expressing its own opinion originally, as to whether this sort of so-called severance could be indulged in, distinctly held that it could not; but that, if the Texas court of civil appeals chose to put that sort of construction on its statute, the United States supreme court was bound to accept that construction, and had no power to do any more than to determine whether the statute, so construed, violated the fourteenth amendment. Says Justice McKenna, speaking for the court: "The courts of Texas have like power of interpreting the statutes of Texas. What they say the statutes of that state mean, we must accept them to mean, whether it is declared by limiting the objects of their general language, or by separating

their provisions into valid or invalid parts"—citing the very cases we have just referred to, the Tullis case and the Paul case.

It is perfectly obvious to our minds, from the Reese case, Harris case, and the Franks case, on the penal and criminal side of the law, as well as from Keokuk Packet Co. v. City of Keokuk, 95 U. S. 80, and the many cases referred to in Judge Rose's notes in the appendix to that volume, citing the <sup>578</sup> Keokuk case, on the civil side of the law, that the supreme court of the United States distinctly holds, as its own view, that the sort of severance, or the sort of so-called limitation by judicial construction, where the court determines, by the evidence in each case, is not allowable. The distinction is put, as we have stated, in the clearest possible form in the Franks and Reese cases, *supra*. Counsel relies on this Keokuk case, strongly, to show that there is a difference, as to the application of the principle we are discussing, between penal or criminal statutes and civil statutes. The language of Justice Strong at the conclusion of the opinion is very broad; but it is perfectly plain, when the facts are looked to, that severance could be had between two provisions in the statute. One provided that all water craft landing at an improved wharf should pay certain wharfage fees. Another independent section provided that all water craft landing at any part of Water street, for a distance of six and one-half miles, should pay wharfage fees, whether there was any wharf there or not. The court held that it was constitutional to require fees for landing at an improved wharf, but not to require fees of a boat landing on the banks of the river; and as both sections were on the face of statute, the court simply severed between them, and struck out the unconstitutional section. That was a perfectly proper application of the doctrine of severance between the provisions of the statute. And so, in the case of Chicago etc. R. R. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 293, 37 N. E. 247, counsel will clearly see that the statute had two sets of provisions. One related to unjust discrimination in transportation charges; the other, to extortionate charges. The supreme court of Illinois accordingly severed the unjust discrimination sections from the sections as to extortion, striking from the statute the unjust discrimination sections which had been held unconstitutional. Here, again, both sets of provisions appeared on the face of the statute, and it was a proper case for severance. In a word, learned counsel will not fail to see, upon a <sup>579</sup> critical examination of all the cases upon the subject, that there never can be any room for the application

of the doctrine as to severing a statute, except in those cases where the constitutional provisions, as well as the unconstitutional provisions, both appear on the face of the statute, and that, wherever a court in order to make a severance has to insert in a statute words or provisions not put there by the legislature, it is guilty simply of judicial legislation.

We wish to call special attention to the further fact that we are not alone in the criticisms we have indulged in, as to certain courts above. Mr. Freeman, perhaps the profoundest law analyst living, in a most able note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep., at top of page 181, distinctly states it as his view that the *Leep* case, *supra*, and other like cases, cannot be upheld. His criticism seems to be rather of the supreme court of the United States for affirming those decisions; but, as said in the first part of this opinion, his criticism should not have been of that court, but of the state supreme courts, for the construction placed by them upon the statutes of their respective states. As pointed out in the *Tullis* case, and the *Waters-Pierce Oil Co.* case, the United States supreme court was helpless, being bound by the construction adopted by the said state supreme courts, and, as we have pointed out, took special pains to say that it affirmed the cases simply because it was so bound. It is said, and correctly, that if we were to place upon this statute the construction that the legislature only meant such corporations as had a business inherently dangerous, the supreme court of the United States would be bound to accept that construction, and, accepting it would undoubtedly affirm our judgment. But we must carefully ascertain, and fearlessly uphold, in every case, the conclusion which, on our consciences, we think clearly right, without reference to results in a higher tribunal. This court neither seeks affirmation, nor fears reversal, at the hands of the United States supreme court. It is concerned alone to <sup>580</sup> find the right, and to maintain it. Of course, if the cases invoked by the very able counsel for appellant from the United States supreme court maintained the doctrine that a statute like this, using the words "any corporation," could be either severed, or limited, by the so-called judicial construction, restraining its general terms by the evidence in each case, so as to exclude, or include, according to the testimony in each varying case—that is to say, if that court had meant and declared that doctrine as the original view of that court—we would be bound to accept that view, since that court is an appellate court from this, where federal questions are

involved. But it is made by the United States supreme court perfectly plain that the original view of that court, on this subject of severance and limitation by judicial construction, is utterly at war with the view of the courts we have quoted from, as explicitly declared in the *Franks*, *Harris* and *Reese* cases, and that all those cases were affirmed by the supreme court of the United States because, and only because, it was compelled to accept the construction placed by the respective state supreme courts upon the statutes of their states, and had no power, such construction being accepted, to decide anything else, except the question whether those various statutes, so construed, violated the fourteenth amendment.

But, fourth, it is objected that in the *Mackay* case the supreme court of the United States distinctly held that it was exclusively within legislative discretion whether these liabilities "should be applied to common carriers by canal and stage-coach, and to persons and corporations using steam in manufactories": and it is said that there is nothing inherently dangerous in the business of a canal carrier or of a stage-coach. Whether this is true as applied to canals is not so clear. It does seem difficult to find any inherent danger in the business of stage-coaching; but, as we have heretofore remarked, we do not understand the dangerousness of a business to be the only distinctive difference on which such statutes may be upheld. <sup>581</sup> On the contrary, we understand the United States supreme court to hold that such statutes may be upheld, if they are based in their classification upon any substantial and essential differences between the natures of the businesses of the favored corporations or individual employers and the natures of the businesses of all other corporations or individual employers. It may be further said, very properly, that what the supreme court said about canals and stage-coaches was quoted from the Iowa supreme court, and was clearly *obiter dicta*.

5. It is objected that the United States supreme court decisions would uphold this statute upon the ground that it is perfectly competent to confer upon the employes of all corporations these remedies and rights, whilst denying them to natural persons, because, and only because, of the fact that they are corporations, the creatures of the state, existing and drawing all their vast privileges from the state. It is said that these considerations constitute such a great difference between the natural person and the corporation as to uphold such legislation. And *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup.



Ct. Rep. 255, is cited, the court saying there "that it was a sufficient answer, in that case, to the argument that the act would be valid if it extended the penalties to all corporations, and that as a matter of fact that statute did not so extend the penalties to all corporations." But this is far from decision to that effect. It is a mere comment *arguendo*.

Again, it is said that in *Pacific Express Co. v. Seibert*, 142 U. S. 352, 12 Sup. Ct. Rep. 250, it was held that "the constitution is not violated by special legislation, applied equally to artificial bodies"; and numerous cases are cited from Judge Rose's notes on this case to sustain this proposition. But the perfect answer to this is that all these are cases as to the power of taxation, a subject wholly different from that under investigation here. And this distinction is clearly pointed out in *Connelly v. Union Pipe Co.*, 184 U. S. 562, 22 Sup. Ct. Rep. 440, where the court says: "It is <sup>582</sup> sufficient to say that those cases had reference to the taxing power of the state, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. A state may, in its wisdom, classify property for the purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not invade the rights secured by the constitution of the United States. But a different consideration controls when a state by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade."

Finally, in aid of our view, we refer to the fact that chapter 65, page 82, of the acts of 1898, which consolidated the rights of action given by section 663 of the code of 1892, expressly uses, as it ought to have done, the words "person or corporation." It provides: "Whenever the death of any person shall be caused by any wrongful or negligent act or omission, or by such unsafe character, ways or appliances, as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband, or father, or mother, or sister, or brother, the person or corporation," etc.

Our conclusion, after the most careful and protracted consideration, is that section 1 of the act of 1898 (*Acts 1898*, p. 85, c. 66), violates the fourteenth amendment of the constitution of the United States in that it imposes restrictions upon all

corporations, without reference to any difference arising out of the natures of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law. We are, therefore, constrained to declare the said act unconstitutional. The legislature, soon to meet, can readily frame an appropriate act not open to these objections.

582 Affirmed.

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*The Principles Involved in the Principal Case* are considered in the monographic note to St. Louis etc. Ry. Co. v. Paul, 62 Am. St. Rep. 165-182. A statute making railroad and other corporations liable for injuries to their employés resulting from the negligence of co-employés is held constitutional in Pittsburgh etc. Ry. Co. v. Montgomery, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582. See, too, Callahan v. St. Louis etc. R. R. Co., 170 Mo. 473, 94 Am. St. Rep. 746, 71 S. W. 208.

CASES  
IN THE  
SUPREME COURT  
OF  
MISSOURI.

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WERTHEIMER-SWARTS SHOE COMPANY v. UNITED  
STATES CASUALTY COMPANY.

[172 Mo. 135, 72 S. W. 635.]

**INSURANCE—Construction of Policy.**—A clause in an insurance policy indemnifying the insured against loss resulting from the accidental discharge of an automatic fire extinguisher, which requires the insured to immediately notify the company of any known defect which shall render such extinguisher more than usually hazardous and cause such defect to be immediately repaired, has reference only to a defect in the extinguisher itself and not to any other contrivance in the establishment of the insured. (p. 505.)

**INSURANCE.—Negligence** of the insured, his agent, servant, or others, not amounting to fraud, though the direct cause of an accident and loss, is covered by, and does not defeat, a policy of insurance. (p. 506.)

**INSURANCE—Willful Act of Negligence.**—A negligent act of a servant in causing a loss, under an accident policy, of which the insured master knew nothing, cannot be imputed to the latter as his willful act of negligence. (p. 506.)

**INSURANCE—Preservation of Property.**—A provision in an accident insurance policy that it does not cover loss or damage caused by the neglect of the insured to use all reasonable means to save and preserve the property insured refers to the means, to be used after the accident causing the loss, to prevent greater loss than is necessary, but it does not refer to any act of negligence causing the accident and loss. (p. 507.)

**INSURANCE—Construction of Policy.**—If any doubt exists as to the meaning of a clause in an accident insurance policy, it must be construed most favorable to the insured. (pp. 507, 508.)

Lyon & Swarts, for the appellant.

P. Werner and W. E. Fisse, for the respondent.

**141** VALLIANT, J. This is a suit on a policy insuring against the accidental discharge of an automatic sprinkling apparatus designed as a fire extinguisher, erected in plaintiff's establishment.

The terms of the policy covered loss or damage to the limit of seven thousand five hundred dollars to property in plaintiff's shoe factory, caused "by the accidental discharge or leakage of water from the automatic sprinkler system" in plaintiff's place of business.

The petition set out the terms of the policy, and averred that plaintiff's goods were damaged to the amount named by the accidental discharge of the apparatus, etc.

The answer admitted the issuance of the policy, denied all other averments, and set up several affirmative defenses founded on certain clauses in the policy therein pointed out, viz., clause 7, which requires the assured to immediately notify the company in writing of any known defect in the apparatus rendering it more than usually hazardous, to cause it to be repaired and in the meantime use such additional precaution as safety required. Then it stated that a defect known to plaintiff existed at the time of the accident and had existed for a long time before, which defect consisted in hooks attached to iron shutters in the building that were suffered to become worn or bent so that when the shutters were closed the hooks so adjusted themselves or were so adjusted by plaintiff or its servant as to extend over and catch upon a pipe in the sprinkler machine and **142** thereby render the system unsafe and more than usually hazardous, for that when a force would be applied to the shutter it was liable to break the pipe; that plaintiff failed to notify defendant of this defect, failed to repair it and failed to use additional precautions in regard thereto. Also clause 9, which declares that the policy does not cover loss resulting, among other causes, from "the willful act of the assured, or by the neglect of the assured to use all reasonable means to save and preserve the property insured hereunder . . . . nor from any loss or damage caused by an employé of the assured under twelve years of age." Then the answer states that the damage resulted from the willful act of the plaintiff in this; that on the date of the alleged injury "certain large and heavy iron fire shutters at one of the windows in the sixth story of the building occupied by plaintiff, and mentioned in said policy of insurance, were partly but not tightly closed by the servants and agents



of the plaintiff, and certain hooks or rods attached to said shutters, and intended to be fastened in the sill of said window, in order to form brace rods to prevent the closing of said shutters when opened, were by the servants, agents and employés of the plaintiff, voluntarily, intentionally and deliberately fastened to or hooked around and over a pipe forming part of said automatic sprinkler system, said pipe being located underneath a workbench in said sixth story, near to the said window, and at about the height of the said window sill. That because of being so fastened to the sprinkler pipe aforesaid, by means of said brace rods, the movement or swaying of one or both of the said iron shutters produced a pulling strain on the sprinkler pipe, and by said strain the pipe was bent and broken and water was discharged at the point of the breakage so caused by the willful act of the plaintiff's servants and employés.

"And defendant says that said discharge of water would not have occurred, nor would the alleged injury of plaintiff's goods have ensued, except for the aforesaid voluntary and willful conduct of the servants and <sup>143</sup> employés of the plaintiff, and that by the said conduct of its servants and employés, the plaintiff's goods in the premises aforesaid were by the plaintiff voluntarily exposed to great, unnecessary and needless danger, and to a risk not within the contemplation of said policy of insurance, and not insured against by this defendant."

And that the plaintiff's loss resulted from its own neglect to use all reasonable means to save and protect the insured property, in this, to wit, that the window shutters above mentioned were provided with certain devices for closing and fastening the same, which plaintiff suffered to become defective so that they would not close as they were designed to do, and that in consequence, the servants of plaintiff, the day before the accident, being unable to fold the rods in their proper places, allowed them to project into the room and either fastened them on the pipe of the sprinkler, or left them where they were liable to fall on it, and the consequence was that on the next day, Sunday, when everybody was absent from the premises the iron window shutters swayed and put a strain on the pipe through one of the rods, and thereby broke the pipe and the apparatus was discharged; that plaintiff's servants had, "for a considerable time prior to the injury complained of," fastened the rods to the pipe in that way, and plaintiff knew it or would have known it if it had exercised ordinary care and that it had never instructed its servants not to do so.

A further defense set up in the answer was that it was shown by a schedule attached to the policy that the value of the property covered was \$75,000 and the policy provided that if at the date of an accident thereunder the value of the property should exceed that amount the defendant should not be liable "for more than such proportion of the aggregate liability hereunder than the cash value so stated in said schedule shall bear to the total cash value of such property at the time of said loss," and the answer averred that the value of the property at the time of the accident was \$125,000. Reply, general denial.

144 There is little, if any, dispute about the facts. Plaintiff's establishment, which is a shoe factory, was supplied with an automatic sprinkler. It was a device having pipes running through the factory, under the workbenches, etc., designed to discharge water into the building in case of accidental fire. It was set to discharge itself when the temperature about it should reach a given degree. But it was of such a character that it was liable to be discharged by accident, and so to flood the premises with water when there was no fire to be extinguished. It was to indemnify the plaintiff against such accidental discharge that this contract of insurance was entered into.

The windows in plaintiff's factory were provided with iron shutters for the fastening of which, when closed, there were iron bars, and for holding them open during the day there were iron brace rods about three feet long with hooks at the end to fit into eyelets on the sills. When the shutters were closed the bars were designed to be thrown into a socket to hold them and the brace rods were to be folded on the window sills. The duty of closing these shutters and adjusting the bars and brace rods for the windows near his workbench, devolved on an employé of plaintiff named Whittaker, aged nineteen years, who had been in the employ of plaintiff about three weeks and whose main work was cutting shoe tongues. There was a pipe of the sprinkler under Whittaker's workbench, but he testified that he did not know what it was and that no one had instructed him in regard to it. There was testimony, however, tending to show that he had been instructed in the manner of closing the shutters, throwing the bars and folding the brace rods. He testified that during the two or three weeks he was engaged in work there he had usually closed the shutters to the window in question, and instead of folding the brace rods on the window sill had drawn them into the room and laid them on the sprinkler pipe. At closing time on the Saturday evening before the accident

after closing the shutters <sup>145</sup> to the window nearest his workbench, he experienced some difficulty in throwing the bar that was to hold them closed, so he merely closed them and drew the brace rods into the room and laid them on the sprinkler pipe. He said: "I closed them as usual, putting the rods over the pipes, and I could not close the bar, and I stayed there until everybody had gone and finally could not close it and left. Q. Did you ask anybody to help you to close it, did you do anything about getting anybody? A. There was no one there. . . . Q. What reason did you have for going away and leaving the shutters and rods in that condition? A. I never was told any different, I thought the pipe would support the rods, hold the shutter."

It appears that on the next day, Sunday, in the afternoon, when there was no one at the factory, the unfastened shutter was blown open by the wind, pulling the brace rod which was attached by its hook to the sprinkler pipe with it, breaking the pipe's connection, and causing the sprinkler to be discharged. The apparatus was supplied with an automatic fire alarm, which immediately gave notice to the fire department, and in fifteen minutes the salvage corps was on hand and the deluge was stopped.

The parties selected arbitrators, one each, who agreed on the award of \$6,850.15, which amount with interest was the jury's assessment of damages. There was testimony tending to show that at the time of the accident the value of the property covered by the policy did not exceed \$75,000.

The cause was tried by a special jury, called at the instance of the defendant, the verdict was for the plaintiff for \$7,158.21. Defendant filed a motion for a new trial which the court sustained, assigning as the ground therefor that it had given erroneous instructions. From the order granting a new trial the plaintiff appeals.

The points presented in the brief for respondent, as relating to the instructions are, that the first instruction <sup>146</sup> for the plaintiff was erroneous, the modification by the court of the fourth instruction as asked by defendant was erroneous, and that the peremptory instruction for defendant should have been given. The purport of the instructions complained of will be referred to hereinafter.

1. Our attention is first directed to the issues made by the pleadings.

The answer sets up several affirmative defenses founded on certain clauses in the policy making conditions in the insurance. Of these the first pleaded is clause 7, which is: "The assured shall immediately notify the company in writing of any known defect which shall render the said sprinkler system more than usually hazardous, and he shall cause such defect to be immediately repaired, and shall in the meantime use such additional precaution as may be required for safety." Then the answer sets up as a breach of that condition the alleged defect in the fastening of these window shutters and the manner of their use. That defense rests on a misconception of the meaning of the policy on that point. The reference made in that clause of the policy is to a defect in the sprinkling machine against whose accidental discharge the contract for indemnity was entered into. The clause has no reference to a defect in the fastenings of the window shutters nor to any other contrivance in the plaintiff's establishment.

Clause 9 is as follows:

"9. This policy does not cover loss or damage resulting from the explosion, rupture, collapse or leakage of steam boilers or steam pipes; nor resulting from any interruption of business or stoppage of any work or plant; nor resulting from freezing; nor resulting from fire or violation of law; nor resulting from or caused by the willful act of the assured, or by the neglect of the assured to use all reasonable means to save and preserve the property insured hereunder; nor resulting from or caused by invasion, insurrection, riot, civil war or commotion or military or usurped power, <sup>147</sup> or by order of any civil authority; nor resulting from or caused by earthquakes or cyclones, or by blasting or explosions of any kind; or by the fall or collapse of any building or buildings; nor does this policy cover any loss or damage to accounts, bills or currency, deeds, evidences of debt, money, notes or other securities, curiosities, drawings, jewels, manuscripts, medals or models; nor any loss or damage caused by an employé of the assured under twelve years of age."

The answer founds two defenses on this clause, viz., that the injury "resulted from and was caused by the willful act of the plaintiff"; second, that it was caused by plaintiff's failure to "use all reasonable means to save and preserve the property insured."

In support of the charge that the injury was caused by the willful act of the plaintiff, the answer specifies that the servant in closing those window shutters "voluntarily, intentionally and



deliberately placed the brace rods with their hooks over the pipes of the sprinkler with the result that when the shutter swayed the rods pulled the pipe out of connection." Even if the willful act of a servant could be construed in that connection as the willful act of the master, which is not conceded, still there is nothing in the answer to indicate that the servant intended to set the sprinkling machine in operation.

The most that can be said of the conduct of the servant as there stated is that he was negligent. It is not stated that he knew that the consequence of putting the rods where he did would be the discharge of the machine. There is scarcely ever a negligent act that has not, somewhere in its source, some act having the appearance of having been intentionally done. The servant intentionally laid the rods on the pipe, but he did not intentionally discharge the sprinkling apparatus. A man sometimes intentionally throws down a lighted match, but it does not necessarily follow that he thereby intentionally caused the conflagration that was started as a result of his match falling where it did the mischief. Mere negligence, even of the insured <sup>148</sup> himself, does not defeat the policy. "Mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy. Indeed, one of the principal objects of insurance against fire is to guard against the negligence of servants and others; and, therefore, while it may be said generally that no one can recover compensation for an injury which is the result of his own negligence or want of care, the contract of insurance is excepted out of the general rule. Nor does it make any difference whether the negligence is that of the insured himself or of others. The law looks only at the proximate cause of the loss": 2 May on Insurance, 4th ed., sec. 408.

The specifications in the answer under this head are not sufficient to support the general charge that the damage complained of was the result of the willful act of the plaintiff, and therefore there is no such issue in the case.

The second defense under this ninth clause is founded on the subdivision which declares that the policy does not cover loss or damage "caused by the neglect of the assured to use all reasonable means to save and preserve the property insured hereunder." In support of that charge the answer reiterates what was before averred in regard to the defect in the shutter appliances and their uses, and that plaintiff had suffered them to

become defective and remain so, and had failed to instruct its servants not to fasten the rods to the sprinkler pipes.

The "reasonable means" to secure and preserve the property referred to in that subdivision of clause 9 is means to be used after the accidental discharge of the machine to prevent greater loss than necessary. It has no reference to the care the plaintiff should take to prevent the accident. The terms to "save and preserve the property insured hereunder" carry the meaning of property in peril and in need of preserving, and in the connection used it can have no other reference <sup>149</sup> than the occurrence of the peril insured against.

Clause 3 of the policy is: "In the event of loss hereunder, the assured shall immediately protect the property from further damage, separate the damaged property and put it in the best possible order. He shall make a complete inventory," etc. Whilst that clause prescribes certain duties to be performed by the assured in case of loss, yet it does not in express terms except from the insurer's liability loss which might have been avoided notwithstanding the accident, if the assured had used all reasonable means at that time to secure and preserve the property insured. The subdivision of clause 9 now under discussion supplements the requirement of clause 3, and excepts such avoidable loss from the risk taken by the insurer.

If we should construe this clause to mean, as defendant contends, that the plaintiff cannot recover for the damage to his goods, if, by reasonable care, he could have guarded against the accident, then it takes all the life out of the policy and renders the defendant liable only when the plaintiff and his servants have been without negligence. What indemnity would there be in an insurance policy purporting to cover property in a factory like this, where there are perhaps hundreds of servants, if the insurer were liable only in case no one was negligent? If the insurer did not intend by this policy to take the risk of negligence of the insured, why did it specify that it did not take the risk of loss by the insured's willful act, and if it did not intend to take the risk of the negligence of plaintiff's servants over twelve years of age, why did it specify that it did not take the risk of the negligence of a servant under the age of twelve years? If there was any doubt as to this construction of the clause in question, if it was as susceptible of the construction contended for by defendant as of that above given, the rules of construction would require us to construe it most favorable to the insured, as the following cases cited in the brief of appellant

hold: *Columbia Ins. Co. v. Lawrence*, 10 Pet. 517, 518; *Louisville* <sup>150</sup> *Underwriters v. Durland*, 123 Ind. 544, 24 N. E. 221; *Feibelman v. Manchester Fire Ins. Co.*, 108 Ala. 200, 19 South. 540; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552; *Showalter v. Insurance Co.*, 3 Pa. Super. Ct. 448; *Karow v. Continental Ins. Co.*, 57 Wis. 68, 46 Am. Rep. 17, 15 N. W. 27; *Catlin v. Springfield Ins. Co.*, Sum. 434, Fed. Cas. No. 2522; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174, 14 Am. Rep. 494; *Guarantee Co. v. Mechanics' etc. Bank*, 80 Fed. 766.

Clause 8 of the policy is to the effect that if at the date of the accident plaintiff's goods in the factory amounted in value to more than seventy-five thousand dollars the defendant would be liable only for such proportion of seven thousand five hundred dollars, the limit of liability, as seventy-five thousand dollars bears to the actual value of the stock of goods at that date. The answer states that the goods at that date were of the value of one hundred and twenty-five thousand dollars. There was substantial evidence to the effect that the goods at the date of the accident did not exceed in value seventy-five thousand dollars, and although there was some evidence to the contrary, yet the question was submitted to the jury under proper instructions and their verdict is conclusive on that point.

If the above analysis of the answer is correct, there are no issues of fact in the case except those tendered by the petition, and the general denial in the answer and the plea relating to the value of the goods. And even as to the general denial, it was almost, if not quite, overcome by the affirmative averments in the answer showing how the accident occurred.

2. The first instruction given for the plaintiff stated the contract of insurance as contained in the policy, and then stated that if the jury believed from the evidence that the plaintiff's goods were damaged "by the accidental discharge or leakage of water from said automatic sprinkler," etc., the plaintiff was entitled to recover. "And the court further instructs the jury that by the words 'accidental discharge or leakage of water' is meant discharge or leakage of water which happened by chance or out of the ordinary course of things, and without the willful act or design of the plaintiff. And the court instructs the jury that even though they believe from the evidence that the plaintiff's <sup>151</sup> servant, Whittaker, was negligent in permitting the hooks attached to the shutters to extend out over or around the sprinkler pipe, yet unless the jury believe from the evidence, that said negligence caused the damage complained of, and was

known to the plaintiff, or might, by the exercise of ordinary care and diligence, have been known to the plaintiff, or unless the jury believe from the evidence that the plaintiff failed to use such means to save and preserve the aforesaid property as a reasonably prudent person would have used under like circumstances and conditions, then such negligence, if any, will not defeat the right of the plaintiff to recover."

The argument against this instruction is that it was improper to refer to the act of Whittaker as an act of negligence; that he was not guilty of any negligence because he had not been properly instructed; that his act was the act of the plaintiff, and the plaintiff's act in failing to properly instruct its servant was, in the language of the policy, a failure "to use all reasonable means to save and preserve the property insured hereunder." There was evidence tending to show that this boy had been instructed to close the shutters and how to place the brace rods, There was no evidence that anyone told him not to hook them on the sprinkler pipe, and if the plaintiff was guilty of any negligence it was in failure to give that caution. How the plaintiff or anyone else could have anticipated that this boy would have hooked those rods on that pipe is not suggested by anything in the record. It seems that he had been laying the rods on the pipe for two or three weeks, but it does not appear that anyone knew it. Besides merely resting the rods on the pipe would not have produced this result if the boy had fastened the shutter. It was the leaving of the shutter ajar and unfastened that produced the result. The boy had never left it unfastened before, and the plaintiff had no notice and no reasonable opportunity to discover that he had left it unfastened on that occasion. There is no dispute but that he was ordered <sup>152</sup> to close the shutter and was shown how to fasten it. Therefore, even if this policy excepted losses caused by the neglect of the insured, there was no evidence that the insured was guilty of any negligence which caused this loss. It was the negligence of the servant only. It is complained that the instruction was erroneous in not defining the term "willful act" of the plaintiff. There was no foundation in the evidence for a defense based on the theory that the injury resulted from a willful act of the plaintiff, and there was no occasion for an instruction on that point.

The only error in the instruction was that it was more favorable to the defendant than it should have been, in this, that it applied the requirement "to use all reasonable means to save and preserve the property" to the plaintiff's duty in discovering how



the boy was conducting the business of closing the shutter, whereas that requirement applied, as we have seen, only to avoiding unnecessary damage after an accident. But the instruction adopted the defendant's construction of the clause of the policy, and the cause was submitted to the jury on that theory, the jury found the issue for the plaintiff, and that is the end of it.

The complaint as to the modification of the fourth instruction as asked by the defendant is of the same character and follows the same line of argument as that in relation to the first instruction for the plaintiff, which we have above discussed.

The instruction as modified and given is as follows:

"The court instructs the jury that under the terms of its policy, offered in evidence, the defendant did not insure the property of the plaintiff therein mentioned against loss or damage caused by or resulting from the neglect of the plaintiff to use all reasonable means to save and preserve such property from loss or damage by water discharged from the sprinkler system mentioned in the policy.

"That by the expression 'use all reasonable means to save and preserve the property,' used in the policy, <sup>153</sup> is meant that the plaintiff and its employes while acting in the scope of their employment should use every means that a person of ordinary prudence and caution, in a like or similar situation, would adopt in the management, operation and control of said sprinkler system, to prevent any discharge or leakage of water therefrom, and to protect the property from the consequences of any such discharge or leak.

"The degree of care which the plaintiff and its employes were required to exercise under the circumstances, was such care as was reasonably commensurate with the situation and the danger of a discharge or leakage of water reasonably to be apprehended in view of the character, location and construction of this sprinkler system, the arrangements of the building in which it was located, the nature of the property insured, character of the business carried on by the plaintiff, the number of persons employed by it in its business conducted in this building, the nature of their duties, and the circumstances that might produce an interference on their part with this sprinkler system, together with such other circumstances as would reasonably influence and govern a person of ordinary prudence similarly circumstanced.

"If the jury believe from the evidence that the loss or damage here sued for was caused by or resulted from the failure or neglect of the plaintiff, or its employ  s acting within the scope of their employment, to use all reasonable means to save and preserve the insured property from loss or damage through the leakage or discharge of water from the aforesaid sprinkler system, as defined in this instruction, and *that such failure or neglect was known to plaintiff or by the exercise of ordinary care and diligence might have been known to plaintiff in time to have prevented any discharge or leakage of water from said sprinkler system*, then the jury will find in favor of the defendant."

The modification is indicated by the words in italics.

**154** This instruction, like that given at the request of the plaintiff, was more favorable to the defendant than the law sanctioned. It in effect excepts from the risk loss occurring through the negligence of the insured or its servants. The proposition is thus expressed in the brief of defendant's learned counsel: "We submit that under the terms of this policy no injury can be regarded as an accidental injury which could have been avoided by reasonable effort on the part of plaintiff." To sustain that proposition would be to overthrow a well-established principle that lies at the foundation of insurance. This argument is followed up by the counsel who say that the failure of the plaintiff to instruct its employ   concerning this machine is such want of care as to preclude a recovery, and in their argument on the point of willfulness they say that the failure to so instruct the servant took his act out of the category of negligence and made it the willful act of the plaintiff. Counsel say that this policy differs from one of fire insurance and is peculiar. If it is correctly interpreted by the counsel it has very little, if any, force as insurance against an accident. The criticism of the court's modification is that it does not direct a verdict for the defendant merely because the discharge of the machine was caused by the neglect of the plaintiff or its servant, but required the jury also to find that that neglect was known to the plaintiff or by the exercise of ordinary care would have been known. It is argued that an instruction that the plaintiff knew or by the exercise of ordinary care would have known of its own negligence is meaningless. That criticism is founded more on the form of the expression than the substance or the meaning; no juror of ordinary intelligence would have any difficulty in understanding that it related to the plaintiff's knowledge of its ser-

vant's negligent act. There was not a particle of evidence that his plaintiff knew or by the exercise of ordinary care could have known of the negligent act of this servant, which resulted in this catastrophe. He had for two or three <sup>155</sup> weeks been in the habit of laying the brace rods on the sprinkler pipe, and it may be argued that in that period the plaintiff had an opportunity to have discovered that practice. But no injury resulted from that practice, and it is not suggested how any injury could have resulted from it. That act became a dangerous factor in bringing about the result when it united with another act, that of leaving the shutters ajar and unfastened. That act was never done but that one time, and the evidence shows that it was unknown to plaintiff and could not, without extraordinary watchfulness, have been discovered.

The instruction should have been refused, but since the court adopted the defendant's theory as to the negligence feature of clause 9 in so far as to apply it to plaintiff's duty before the accident, the modification still left the instruction more favorable than defendant was entitled to.

On the conceded facts of the case the plaintiff was entitled to recover, and no judgment for the defendant could have been sustained. There was no error in the instructions of which the defendant has any right to complain. The court erred in sustaining the motion for a new trial.

The judgment is reversed and the cause remanded to the circuit court with directions to overrule the motion for a new trial and enter judgment in accordance with the verdict. All concur.

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*The Negligence of an Insured* or of his employes does not bar his right to recover for the loss or destruction of the insured property: *McGannon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778, and cases cited in the cross-reference note thereto.

*An Insurance Policy*, when susceptible of more than one interpretation, or when the meaning is doubtful, will be construed most favorably to the insured: *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139; *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 61 Am. St. Rep. 627, 78 N. E. 751; *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458, 66 Am. St. Rep. 49, 53 Pac. 918; *Bank of Tarboro v. Fidelity etc. Co.*, 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588.

## STATE v. JOHN.

[172 Mo. 220, 72 S. W. 525.]

**MURDER—Blow with Fist.**—Murder may be committed by killing another by striking him a blow with his fist. (p. 515.)

**MURDER—Blow with Fist—Intent.**—A man cannot approach an unoffending citizen, deal him a deadly blow with his fist in a vital part, and when his death ensues therefrom defend his act on the ground that he merely intended to punish and not to kill him. (p. 517.)

T. P. Young, E. E. Schnepf and W. Scullin, for the appellant.

E. C. Crow, attorney general, and C. D. Corum, for the state.

**222 GANTT, P. J.** The defendant was indicted at the October term, 1901, of the circuit court of the city of St. Louis and was regularly assigned to the criminal division of said court (No. 9) presided over by Judge Franklin Ferris.

The charge was murder in the second degree. Henry Richter was the victim. The substantial averment is that defendant, on the third day of July, 1901, **223** at the city of St. Louis, "with force and arms in and upon one Henry Richter, in peace of the state then and there being, feloniously, willfully, premeditatedly, and of his malice aforethought did make an assault, and that the said Edward John then and there feloniously, willfully, premeditatedly and of his malice aforethought, with his fist in and upon the jaw and head of him, the said Henry Richter, did strike, knock, hit, and beat, and did then and there feloniously, willfully, premeditatedly and of his malice aforethought knock, push, cast and throw him, the said Henry Richter, with great force and violence down, in and upon the pavement, brick sidewalk and stone curbing then and there being, and the said Edward John thus and thereby, then and there, feloniously, etc., by the means aforesaid, then and there did give the said Henry Richter one mortal wound and fracture of the skull, of which mortal wound so as aforesaid inflicted by defendant, the said Richter languishing did live from the third day of July, 1901, till the eleventh day of July, 1901, on which last-named day the said Richter died at the city of St. Louis."

The indictment is in all respects according to the most approved precedents. We have merely set forth the substance. Defendant was duly arraigned and pleaded not guilty. He



was tried December 5, 1901, and convicted of murder in the second degree and sentenced to the penitentiary for fifteen years.

The circumstances attending the homicide were as follows: The defendant at the time of the occurrence related in this record, was a dog-catcher. The deceased was a laborer, forty-three years of age. On the morning of the tragedy, the defendant, in company with another who was engaged in the same business, was going to his work, and about the hour of 6:30 o'clock as the deceased and other laborers were going to their daily toil, one of these dog-wagons and its occupants were observed. The wagon contained the defendant and his associate and a driver; and as they were passing the <sup>224</sup> intersection of Howard street and Broadway, in that city, they spied some dogs that were wandering thereabout. The defendant and his associate left their wagon and made an effort to seize and impound the dogs. The pursuit of the dogs by the defendant and his partner attracted the attention of the deceased, who stopped, as did others, to gratify their inherent curiosity or to enjoy the pursuit of the dogs. Some boys near by began barking after the manner of a dog, and jeering defendant and his comrade. This conduct on the part of the boys seemed to arouse the ire of the defendant. The state shows by an overwhelming amount of evidence that the defendant walked up to the deceased, who was standing somewhat apart from the crowd, with his coat on his arm and with his dinner-pail in the other hand; that the defendant, without justification or excuse, immediately struck the deceased upon the jaw and that the deceased fell upon the sidewalk and that, either from the blow or the fall, or both combined, he received a mortal wound producing a contusion and laceration of the brain which rendered him unconscious, in which condition he remained until his death, eight days later.

There was a perfect unanimity of expression by all the witnesses, save the defendant, that the deceased was inoffensive and unoffending. He was immediately taken to his home, and on the following day was removed to the Good Samaritan Hospital, where his skull was trephined, but the operation did not subserve the end sought and the deceased died on July 11, 1901. The state proved that the skull of the deceased was fractured, the brain lacerated and contused, and that the injuries were such as to inevitably cause death. The defendant, immediately on striking the blow, hurriedly sought his wagon, got in it, and drove rapidly away, and was arrested the same morning and admitted he struck the deceased.

The evidence on behalf of the defendant tended to show that he was pursuing a dog; when he passed the deceased he was tripped by him and fell. He testified that when he went to rise, he was kicked in the breast <sup>225</sup> and hit in the ear by some one and that, therefore, he struck the deceased. But he does not say that the deceased kicked or struck him, or that he did anything save trip him. Indeed his own testimony does not show that the deceased intentionally tripped him; he simply stated "that he stuck out his foot and I fell." The defendant was not supported on this point by any of the witnesses, who did not seem to be prejudiced against the defendant and most of whom were strangers to the deceased. They testified no such thing occurred. The court instructed the jury on murder in the second degree and manslaughter in the fourth degree, and gave the usual instructions on reasonable doubt, credibility of witnesses, etc.

The indictment, as already said, was in all respects sufficient if murder can be committed by one person killing another by a blow with his fist. In *State v. Hyland*, 144 Mo. 302, 46 S. W. 195, we held that it was as much murder to kill a man with his fist in the circumstances of that case as if the defendant had shot him with a loaded revolver: *People v. Munn*, 65 Cal. 211, 3 Pac. 650. The facts of this case are in all respects the counterpart of that. Counsel have, however, respectfully urged a reconsideration of the *Hyland* case. In that case, as in this, the indictment charged not only that the defendant struck his victim with his fist, but knocked him down with great force and violence on the stone pavement, and by the combined force of the blow and the fall on the hard pavement the mortal wounding was accomplished.

In *Rex v. Kelly*, 1 Moody, 113, it was conceded that if the indictment had charged the blow with the fist and the fall, it would have been sufficient, but as it was charged to have been with a brick in the right hand of the prisoner, it was a variance.

Counsel cite us to *Wellar v. People*, 30 Mich. 16, in which the supreme court of Michigan points out that whether a person who has killed another without meaning to kill him is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was <sup>226</sup> actually intended must be of controlling importance. This has always been the doctrine of the common law, but in that case the trial court did not submit to the jury whether the defendant in that case might not be guilty of man-

slaughter only. The case is well reasoned, but the facts are unlike those in Hyland's case or the case at bar.

In this case the defendant alone of all the witnesses states that as he passed the deceased "he struck out his foot and defendant fell." He does not even say that deceased intentionally tripped him, but upon this state of facts the court gave an instruction on manslaughter in the fourth degree. The contention of defendant's counsel is that there was no evidence to support the charge of murder in the second degree. In a word, that the character of the assault was such that the jury were not justified in finding that defendant intended to kill or do the deceased any great bodily harm; counsel concede that the manner of killing is immaterial; that one may be guilty of murder with his fist as well as with a deadly weapon, but say "though the manner is immaterial, the intent with which the act is done and circumstances surrounding the act as throwing light on that intent, are material." This is all true, but it ignores the want of any mitigating facts save that which defendant testified to, the tripping of defendant, as to which the court gave him a most favorable instruction on manslaughter. All the other, and we may add, disinterested, evidence disclosed that the deceased was a perfect stranger to defendant; that he merely halted a moment on the sidewalk, attracted by the excitement produced by the defendant and his companion's effort to catch the stray dogs; that he was apart from the crowd who were watching the defendant and his companion pursue the dogs, and that defendant, apparently incensed at the boys who were barking, threatened to kill some of the crowd, and then, without the slightest provocation by word, gesture or act on the part of the inoffensive and unoffending workman who was merely looking on, singled him out and came up to him and <sup>227</sup> without warning struck him the murderous blow which instantly felled him back to the sidewalk. How can counsel argue that such a blow under such circumstances was not intended to produce great bodily harm?

The court properly instructed the jury that a man is presumed to intend the natural and probable consequences of his acts. It was not a case in which there was a mutual combat with fists or a lick with a stick not calculated to produce death, but a malicious unprovoked attack upon a defenseless and unsuspecting citizen who had given no provocation and was utterly ignorant of the intended assault. Such an act was malicious in and of itself and clearly felonious.

A strong brawny man will not be allowed to approach an unoffending citizen in a public highway and deal him a deadly blow with his fist in a vital part, and when death, the natural consequence of his act, ensues, be heard to say that he merely intended to punish him and not to kill him. The facts of this case disclose unmitigated brutality, conduct much in keeping with the business in which defendant was engaged.

We have no hesitancy whatever in holding that the trial court properly instructed on murder in the second degree and that the jury properly found defendant guilty of that offense. The record is without error and the judgment is affirmed.

Burgess and Fox, JJ., concur.

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*Murder.*—An assault and battery may be committed under such circumstances or in such a manner as to make the homicide, if it results, murder, although there was no formed design to take life: See the monographic note to *Johnson v. State*, 90 Am. St. Rep. 576.

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## GLADNEY v. SYDNOR.

[172 Mo. 318, 72 S. W. 554.]

**VESTED RIGHTS** may be Created either by the common law, by statute, or by contract. No matter how created, they are entitled to the same protection. (p. 521.)

**RETROSPECTIVE AND EX POST FACTO LAWS.**—Retrospective laws relate to civil rights and civil proceedings, while ex post facto laws have special application to criminal cases. (p. 522.)

**RETROSPECTIVE LAWS—Vested Rights.**—Laws are not to be deemed retrospective, unless they impair civil rights which are vested. (p. 522.)

**HOMESTEADS—Vested Rights—Retrospective Laws.**—A husband who acquires a homestead under a statute allowing him to sell or encumber it, subject to the wife's inchoate right of dower, without her joining him, except when she has filed her homestead claim, has a vested right to sell or encumber such homestead, subject to such limitations, and this right cannot be taken from him by a statute subsequently enacted which debars him from selling or in any manner encumbering the homestead. Such statute can operate only prospectively and cannot be applied to husbands who have acquired a homestead prior to its enactment. As to them it is retrospective in the operation and impairs a vested right. (p. 524.)

**HOMESTEADS.**—Vested Rights in a Husband to Convey His Homestead without his wife joining him is not in any way interfered with by the fact that she may at any time file her homestead claim, and thereby nullify his vested right to convey. The dura-



tion of such right in the husband is optional with his wife, but not with the legislature, and it cannot subsequently take it away. (p. 524.)

**VESTED RIGHTS.—Failure to Exercise** vested rights before the enactment of a subsequent statute which seeks to divest them, in no way affects or lessens such rights. (p. 526.)

**VESTED RIGHTS—Retrospective Laws.**—A law which, even if intended simply to change the remedy or procedure, is void if in fact it impairs vested rights. (p. 528.)

Norton, Avery & Young, for the appellants.

Martin & Woolfolt, for the respondents.

**321** FOX, J. This was an action commenced by the appellants in the Lincoln circuit court, on October 3, 1899, to enjoin a sale, under a certain deed of trust, and to cancel and hold for naught said deed.

The petition contains substantially the following allegations: "1. Clemanda Gladney, the real plaintiff, **322** stated that she was, and since 1859 had been, the wife of her coplaintiff, George W. Gladney; that Thomas G. Sydnor was the sheriff of Lincoln county, Missouri; that the land described in the petition, consisting of one hundred and seventy-three and seventy-four one-hundredths acres, had been owned and occupied by George W. Gladney as a homestead for a great many years, all of it since 1884, and that during all that time plaintiff and George W. Gladney, as husband and wife, had owned and occupied the same as a homestead; that on May 25, 1897, George W. Gladney, without the knowledge and consent of plaintiff, Clemanda Gladney, his wife, executed and delivered to George O. Hamilton, trustee, for the use and benefit of Ellen E. Wilson, a deed of trust, securing a note made payable to Ellen E. Wilson; that Clemanda Gladney, as the wife of George W. Gladney, did not join with George W. Gladney in the execution of said deed of trust, and that said deed of trust was on the land in plaintiff's petition described, being the one hundred and seventy-three and seventy-four one-hundredths acres composing and comprising the homestead of George W. Gladney and Clemanda Gladney at that time; that the note described in said deed of trust was due; that George O. Hamilton, as trustee, had refused to act, and that defendant, Thomas G. Sydnor, the then sheriff of Lincoln county, Missouri, under the provisions of said deed of trust, had the land advertised and was threatening the sale of same.

Plaintiff Clemanda Gladney further stated that since May 25, 1897, to wit, the twenty-first day of March, 1899, the title

to said land had been conveyed to her through mesne conveyance from George W. Gladney; that she, Clemanda Gladney, was now the sole owner of said land; that the deed of trust given by George W. Gladney to George O. Hamilton, trustee, was, under the laws as they now exist in the state of Missouri, absolutely void; but that if Thomas G. Sydnor was permitted to sell and make a deed thereto, it would cast a cloud over her title to the land, and that the deed of trust itself made by George W. Gladney, then on record, cast a cloud over her title. She therefore prayed for the judgment and decree of the court enjoining <sup>323</sup> Thomas G. Sydnor, the acting trustee, from selling said land, and enjoining Ellen E. Wilson from attempting to carry into execution the said deed of trust made by George W. Gladney, and praying the court to cancel and hold for naught the said deed of trust.

"This petition was filed in the circuit court of Lincoln county, Missouri, and the court not being in session, and no judge of the circuit court being in the county, a temporary injunction was issued on October 3, 1899, by the probate court of the county.

"In the circuit court, Ellen E. Wilson filed a separate answer, in substance as follows: Admitting that plaintiffs were husband and wife; admitting that George W. Gladney alone executed the deed of trust complained of on May 24, 1897, and admitting the record of the deed of trust as charged in the petition. Denied the use of the land as a homestead; denied that Clemanda Gladney had become the bona fide owner of any portion of the land since the execution of the deed of trust; charges that if Clemanda Gladney had obtained the title to any portion of the land from George W. Gladney, the same was without consideration, and the same was to defraud his creditors, and especially this defendant; admitted that defendant Sydnor was the sheriff of Lincoln county, Missouri, and had the land advertised for sale under the terms of said deed of trust, and denying each and every allegation in the petition; and further answering, alleging that the deed of trust complained of was made to secure an indebtedness created by George W. Gladney prior to June 21, 1895, and alleging that up to the time of making said deed of trust George W. Gladney owned the land described therein, consisting of one hundred and seventy-three and seventy-four one-hundredths acres, in his own right, which was then of the value of four thousand dollars; alleged that Gladney owned the land prior to June 21, 1895, and as such owner

and head of a family had and possessed a vested right and power unrestricted by any act or deed or declaration of the said Clemanda Gladney, made or executed by her prior to the making of said deed of trust, to convey, alienate or encumber the same, <sup>324</sup> whether said land, or any part thereof, was a homestead or not, and that in the exercise of said right George W. Gladney made said deed of trust.

"Defendant Sydnor answered, stating that he was sheriff of Lincoln county, and at the request of defendant Ellen E. Wilson advertised the land for sale under the power of said deed of trust made by George W. Gladney to George O. Hamilton, trustee, said Hamilton having refused to execute said trust; and further answering said he had no knowledge or information as to the other allegations in plaintiffs' petition.

"Plaintiff's reply to the separate answer of Ellen E. Wilson was a general denial of all new matter therein contained. Defendant then filed a motion to dissolve the temporary injunction granted by the probate court."

Upon the trial in this cause, the court sustained the motion to dissolve the injunction and dismissed plaintiffs' bill. From this judgment, this cause is brought here for review.

There is no dispute as to the testimony in this cause. It substantially appears from the evidence introduced that appellants were husband and wife, and had for many years been occupying the land in dispute, and were residing upon it at the time of the execution of the deed of trust in May, 1897. All the land involved in this suit was procured by the appellant, George W. Gladney, prior to 1884, and he and his wife were occupying it continuously since 1884. Prior to June 21, 1895, George W. Gladney borrowed two sums of money from the respondent, Ellen E. Wilson, giving her two notes therefor. On May 21, 1897, these two notes had not been paid, and amounted to four hundred and twenty-eight dollars and sixty-seven cents. George W. Gladney, on that day, May 24, 1897, took up the two old notes and executed to Mrs. Wilson one note, including the aggregate amount of the old notes, and to secure the payment of the renewed note, executed the deed of trust which is the subject of this suit. The appellant, Clemanda Gladney, wife of George W. Gladney, did not join with her husband in the execution of this deed of trust. It further appears that subsequent to the execution <sup>325</sup> of the deed of trust by George W. Gladney, he and his wife, on March 21, 1899, executed a deed, conveying this same land (except ten

acres) to O. H. Avery, and on the same day O. H. Avery and wife conveyed the same land conveyed to him by George W. Gladney and wife, to Clemanda Gladney. It is also disclosed by the record in this case that the land embraced in the deed of trust far exceeded the value of the "homestead," as defined by the statute. It is practically admitted that the deed from George W. Gladney and wife to O. H. Avery was a voluntary conveyance and without consideration. This is a sufficient reference to the testimony, in order to indicate the vital questions involved in the controversy.

Under the well-settled law of this state, prior to the enactment of the statute of 1895, it is beyond dispute that the husband could sell or encumber the homestead, subject to the wife's inchoate right of dower, without the wife joining with him, except where the wife had filed her claim as provided by section 5435 of the Revised Statutes of 1889. This was clearly announced and determined in the cases of *Greer v. Major*, 114 Mo. 145, 21 S. W. 481, *Tucker v. Wells*, 111 Mo. 399, 20 S. W. 114, *Kopp v. Blessing*, 121 Mo. 391, 25 S. W. 757, and *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. 1078. In 1895, the legislature materially altered and changed the rights of the husband, in respect to his right to encumber or sell the homestead: *Laws 1895*, p. 185. This change is embraced in these words: "The husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void."

If we concede that this was a homestead as contemplated by the statute, which the husband was debarred from and incapable of selling or encumbering, notwithstanding it far exceeded the value of the homestead defined by the statute, then there is only one question before us for determination, and that is, Was the right of the husband prior to 1895, to sell and encumber the homestead without the wife joining with him, such a <sup>326</sup> vested right as the act of 1895 could not deprive him of? This leads us to the investigation of this all-important question. It is not only a very important one, but equally as interesting, for it is the first time this question has been presented under this marked change in the statute.

Vested rights may be created either by the common law, by statute or by contract, and it makes no difference as to the method of their creation; they are entitled to the same protection. If, in this case, the right of appellant, George W. Glad-



ney, to convey his homestead, prior to the act of 1895, without his wife joining with him in such conveyance, was a vested right, it becomes so by the operation of law, and is entitled to the same protection under the constitution and laws of the land, as though it had bene created by contract. A vested right was defined in the case of *Marshall v. King*, 24 Miss. 85, to be "an immediate fixed right of present or future enjoyment." In the case of *Calder v. Bull*, 3 Dall. (U. S.) 386, Chase, J., says: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions or to possess certain things, according to the law of the land." Judge Story, in the case of *Society v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156, held that "upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Article 2, section 15, of the constitution of Missouri provides "that no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the general assembly." The reference in this provision to ex post facto laws has special application to criminal cases; but the subdivision of this constitutional provision, which is intended to protect every citizen against the impairment of vested rights is that inhibition against the passage of laws retrospective in their operation. The term "retrospective in their operation" as used in our Bill of

327 Rights is one which relates to civil rights and proceedings in civil causes (*Ex parte Bethurum*, 66 Mo. 549): hence the well-settled rule deduced from all the authorities is that "acts of the legislature are not to be considered as retrospective, unless they impair rights that are vested, because most civil rights are derived from public laws": *Rich v. Flanders*, 39 N. H. 304, and cases cited and discussed.

In view of this principle we are led to the conclusion that an additional question must be answered in this investigation. The first inquiry in this case is, Was the right of George W. Gladney to convey or encumber his homestead without his wife joining in such conveyance, a vested right, and as such, could it be impaired by the act of 1895?

The second inquiry is as to the act of 1895. Is it to be construed simply as prospective in its operation, or if it is intended

to be retrospective, then is it not in conflict with the constitution of this state, as quoted herein?

It is clear that if George W. Gladney had a vested right in dealing with his homestead prior to 1895, then if the act of 1895 is intended to impair that right, it would truly be retrospective in its operation.

As to the first proposition, we have reached the conclusion that the appellant George W. Gladney, had a vested right, in respect to conveying and encumbering his homestead, prior to the act of 1895, and that act cannot impair such right. To us it seems as one of the highest privileges and dearest rights that can be bestowed upon the citizen. The law that creates the right to deal with your property without compelling you to have someone unite with you in the conveyance truly confers an inestimable privilege. This land was his, and beyond question he had the right to convey it (subject to her inchoate right of dower), prior to the act of 1895, without having his wife join with him in the deed. The fact that his wife could file her claim as provided in section 5435 of the Revised Statutes of 1889, heretofore referred to, does not change the rule so far as being a <sup>328</sup> vested right. The right to convey was clearly given him, and the law provided the method how he could be barred of that right, and that a personal privilege vested in the wife, a right she could exercise or refuse to exercise. The law that created the homestead also created a right in the wife, by which she could divest the husband of his right to sell or encumber it; but this by no means contemplated that the legislature could, by enactment, bar or impair the right given the husband, in respect to his property. It may be said by appellants that this right to convey was merely conditional upon the failure of the wife to file her claim under the statute; the right to convey was not conditional, it was vested; its duration was optional with the wife. This does not alter or change the principle that the legislature cannot by a law, retrospective in its operation, impair vested rights; it has no more power under the constitution to impair this right than it has to impair rights that are not subjected to any limitation as to its duration. No one under the law had the right to impair or interfere with his right of alienation, except his wife, and the legislature cannot step in and exercise that privilege for her. She and she alone could exercise it.

Does the act of 1895, if construed as being retrospective in its operation (in other words, as being operative upon persons

who are married and who had acquired the homestead before its passage) impair the vested right of the husband? It certainly does. Before the passage of the act, he could convey, himself. After the passage, he is not only barred, but the act says he "shall be incapable of conveying without his wife joins in the conveyance." Impair means to make worse, to lessen the power, to weaken, to enfeeble, to deteriorate. This is as Webster defines it. Is not the power of the husband in respect to this homestead lessened, weakened and deteriorated by the act of 1895, *supra*? As was said by the court in the celebrated case of *Calder v. Bull*, 3 Dall. (U. S.) 386: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions, <sup>329</sup> or to possess certain things, according to the law of the land." Did not the husband in this cause have the power to do certain acts in respect to the property in dispute, that the present law prohibits him from doing?

That able and illustrious jurist, Judge Story, very tersely places the test when he said in the case of *Society v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156, that "upon principle, every statute, which creates a new obligation, imposes a new duty, or attaches a new disability, must be deemed retrospective." Apply this test to the case at bar. The statute of 1895 imposes upon the husband the new duty, if he desires to convey, of having his wife join in the conveyance; it attaches a new disability, for the very words of the present statute are that the husband is incapable of alienating his property. It is no answer to this question to say that his right to convey is not absolutely destroyed, that it is only partially so. In the case of *Bank v. Sharp*, 6 How. 301, the doctrine is clearly announced that "one of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

The conclusions reached in this case that George W. Gladney had a vested right prior to the act of 1895, and that such right cannot be impaired by a subsequent statute and that if the act of 1895 was intended to apply to him, it is retrospective in its operation and is in conflict with the organic law of this state, are supported by principles announced by this court, in analogous cases, and by conclusions reached in other states, in cases identical in principle with the one before us.

In the case of *Arnold v. Willis*, 128 Mo. 145, 30 S. W. 517, Burgess, J., very clearly announced this doctrine as to the vested rights of the husband: "Prior to the revision of the statutes in 1889, a husband, by virtue of his marital rights, was entitled to the possession of his wife's lands, held by her as at common law, and could sue therefor in his own name; and the enactment of sections <sup>330</sup> 6869 and 6864 of the Revised Statutes of 1889, providing that real estate belonging to the wife should be her separate property and under her sole control, and empowering her to sue and be sued, at law or in equity, as a feme sole, did not deprive the husband of such rights in his wife's property, which had become vested prior to 1889."

In the case of *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788, all the authorities are collated and reviewed. That case settles the law in this state that the legislature has no power to pass laws, retrospective in their operation, so as to affect vested rights. The statute under consideration in the *Leete* case was the married woman's act of March 25, 1873. It was held that the act "creating a separate estate in the wife's personalty, inclusive of her rights of action and providing that the same shall not be deemed to have been reduced to the possession of the husband by his use, occupancy or care, but only by her express assent in writing, is to be construed prospectively and does not apply to marriages in existence at the time of its passage or to rights which had then accrued." It was further held that "an application of said statute to marriages then in existence or to rights which then had accrued, would be violative of the constitutional provision prohibiting the enactment of a law retrospective in its operation." The conclusion reached in that case was that the married woman's act of 1873 could only operate prospectively, and did not apply to marriages in existence at the time of its passage or to rights that accrued to such existing marriages.

So we say in this case, that the act of 1895 could only operate prospectively, and is not to be applied to husbands who had acquired homesteads prior to the passage of the act. George W. Gladney, prior to the enactment of this statute of 1895, had the right to convey his homestead without his wife joining him, and as was very appropriately said by the learned judge in the *Leete* case, "these were his rights; but, when he woke up on the morning the section mentioned went into <sup>331</sup> operation, he found himself, if plaintiff's position be correct, completely de-



vested of his former vested rights, laboring under a 'new disability.'"

It is now the settled law of this state that an act of the legislature "is to operate prospectively only, and not otherwise, unless upon the face of the act itself the exceptions to the prospective rule do plainly and unmistakably appear": *Lecte v. State Bank*, 115 Mo. 184, 21 S. W. 788.

It may be argued that even though the right of George W. Gladney, prior to the present statute, was a vested one, yet as he had not availed himself of that right, the present law would be applicable, and he could not exercise such right after the change in the statute. Perry on Trusts, a work of recognized authority, announced the doctrine upon a question identical in principle with the one before us. He says (2 Perry on Trusts, 5th ed., sec. 676): "On principle, it would seem that the right to reduce the wife's choses in action to possession vested in the husband at the time of the marriage, and could not be divested by a statute passed after the marriage, although the husband had not, at the time of the passage of the act, reduced the choses to possession; and so it has been ruled in several cases."

This is a complete answer to that argument, for in the doctrine announced by Perry, as above quoted, the principle is the same; if the right existed, it makes no difference about the exercise of it before the passage of the subsequent statute that undertakes to divest it.

Upon the question involved in this case, as to the right of George W. Gladney prior to the act of 1895, being a vested right, we are of the opinion that the unbroken line of decisions of North Carolina upon a point which in principle is identical with the one at bar are decisive of this question. That we may fully appreciate the application of the cases to which we hereafter in this opinion direct attention, it would be well in a brief way to refer to the provisions of the constitution and law of that state. In 1838, the state of North Carolina adopted and ratified its constitution. The constitution itself created a homestead defining the amount <sup>332</sup> of land and value, etc., which was exempted from levy of execution. It also provided for the conveyance of the homestead, but declared that no deed executed by the owner of the homestead should be valid without the voluntary signature and assent of his wife. Prior to the adoption of this constitution, the owner of the land occupied by him and his wife, could be conveyed by the husband alone. In the case of *Gilmore v. Bright*, 101 N. C. 382, 7 S. E. 751,

in passing on the question as to the right of the husband to convey the land, subsequent to the adoption of the constitution, the court says: "The case shows that the lands in dispute were the property of Samuel Gilmore long prior to the adoption of the constitution of 1868, and that he and his wife were married long prior to that time. There never was any allotment of the said lands as a homestead, nor was there ever any petition by the said Gilmore to have such an allotment made, nor was there ever any act of his indicating any purpose voluntarily to have said lands, or any portion thereof, dedicated to the purposes of a homestead. He had, prior to the adoption of the constitution of 1868, the absolute right to sell or dispose of these lands as he pleased, without the concurrence of his wife, and, if he chose to do so, without her consent; and it is too well established by the authorities, federal and state, that this right was not divested by article 10, section 8, of the constitution of North Carolina, to be questioned now. The state could not by its constitution or its laws, subsequently adopted or enacted, deprive him of his vested right to sell or dispose of the land in question, without contravening that provision of the constitution of the United States which declares that no state shall pass any 'law impairing the obligation of contracts.' " The learned judge cites in support of that principle announced the cases of *Edwards v. Kearzey*, 96 U. S. 595; *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500; *Bruce v. Strickland*, 81 N. C. 267; *Murphy v. McNeill*, 82 N. C. 221; *Reeves v. Haynes*, 88 N. C. 310; *Fortune v. Watkins*, 94 N. C. 304; *Castlebury* <sup>333</sup> v. *Maynard*, 95 N. C. 281, and the numerous cases cited in these authorities.

In the case of *Bruce v. Strickland*, 81 N. C. 267, the learned judge, after reviewing all the authorities upon the question as to the application of the enactment of subsequent statutes lessening the power of the husband under former statutes in respect to his lands, and reaching the conclusion that such subsequent acts do not affect rights secured under former laws, says: "These decisions rest upon the sanctity of vested rights under the protection of the constitution, among which is embraced the 'jus disponendi,' or right of alienation. The principle is too deeply imbedded in the fundamental law of free government to require vindication."

It may be said that these North Carolina cases are based upon the fact that prior to the adoption of the constitution there was no homestead, and the land, not being a homestead, could be alienated by the husband without the wife joining in the deed.

That does not alter or change the principle announced as applicable to the case at bar, for in this case, the homestead prior to 1895, could be alienated by the husband alone, subject to her dower the same as the land mentioned in the Carolina cases, and it is apparent from an investigation of all those cases that they clearly announce the principle that the right of a husband to sell or encumber his land without his wife joining in the conveyance, is a vested right, which a subsequent statute which imposes upon him a new disability and undertakes to prevent him from performing this act alone, cannot impair.

This brings us to the last contention of appellants. Appellants insist that the statute of 1895 did not impair any vested right of George W. Gladney; but that it simply changed the remedy or procedure of the wife in respect to the homestead. The statute of 1895 does not require a single step to be taken by the wife. She is not required to proceed in any way; but it simply imposes upon the husband a new disability, rendering him incapable of doing an act which, under the prior law, he had a perfect right to do. If the statute had provided <sup>334</sup> that the wife should adopt some other method of preventing the sale or encumbrance of the homestead, then it might be said that it was simply a change in the course to be adopted by her, to prevent the husband from acting. But it must be remembered that this change of the statute does not require her to proceed at all; in effect, the legislature says in the act of 1895: "Under the former law we provided a remedy for you to prevent the exercise of certain rights of your husband, in respect to the homestead. We will now exercise this right for you, irrespective of the fact whether you desire it done or not; we will simply divest your husband of the power to sell or encumber the homestead."

We emphatically hold that this alteration and change in the statute is not simply a change in the remedy or procedure; but is, in the clearest terms possible, a deprivation of a right, which the husband had prior to the enactment of the statute. We may add that a law which, even if intended simply to change the remedy or procedure, if in fact it impairs vested rights, is just as obnoxious to the constitutional inhibition as if it in the clearest terms violated the constitutional provision. We have examined the cases cited by the learned counsel for appellants upon this question, and we are of the impression that they are not based upon similar grounds, and hence are insufficient to change the conclusions reached upon this contention.

Entertaining the views as herein expressed as to the vested rights of George W. Gladney, in respect to the land in controversy, we are of the opinion that the action of the trial court in sustaining the motion to dissolve the injunction and dismissing plaintiffs' bill was correct, and it is ordered that the judgment be affirmed.

All concur.

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*Legislation which Impairs a Vested right or estate is unconstitutional:* Matter of Pell, 171 N. Y. 48, 89 Am. St. Rep. 791, 63 N. E. 789; Baltimore etc. Ry. Co. v. Reed, 158 Ind. 25, 92 Am. St. Rep. 293, 62 N. E. 488. And, although the legislature may modify or change the form of the remedy, provided no substantial right secured by contract is thereby impaired (State v. Heldenbrand, 62 Neb. 136, 89 Am. St. Rep. 743, 87 N. W. 25; Burk v. Putnam, 113 Iowa, 232, 86 Am. St. Rep. 372, 84 N. W. 1053), yet any law which in its operation amounts to a denial or obstruction of the rights accruing by contract, though professing to act only on the remedy, is unconstitutional and void: Merchants' Bank v. Ballou, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481.

*A Statute Giving a Husband a right to the use of his wife's land, with power to rent it and receive the rent, vests in him a statutory right, so it has been held, of which the legislature has no power to divest him by a subsequent married woman's act:* Rose v. Rose, 104 Ky. 48, 46 S. W. 524, 84 Am. St. Rep. 430, and see the monographic note thereto on the constitutionality of statutes affecting rights based on a pre-existing marriage.

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## SHIELDS v. HOBART.

[172 Mo. 491, 72 S. W. 669.]

**CORPORATIONS—Liability of Stockholders.**—The stockholders in a corporation are liable to its creditors to an amount equal to the unpaid balance due on the nominally paid-up certificates of stock issued to them. (p. 535.)

**CORPORATIONS—Liability of Stockholders—Fraud.**—It is not necessary to charge fraud to subject a stockholder's unpaid liability to a creditor's judgment against the corporation. (p. 535.)

**CORPORATIONS—Right to Prefer Creditors.**—A corporation while a going concern may prefer one creditor to another. (p. 536.)

**CORPORATIONS—Preferences—Private Debts of Officers.**—If a corporation has reached a point where its assets are insufficient to satisfy its corporate debts, its managing officers cannot pay their private debts from the assets of the corporation as against the claims of its existing creditors who complain. Such transaction is prima facie fraudulent. (p. 537.)

**CORPORATIONS.—Dividends can be Paid Only** out of profits or the net increase of the capital of a corporation and cannot be



drawn upon the capital contributed by the shareholders for the purpose of carrying on the company's business. (p. 540.)

**CORPORATIONS—Dividends.**—Neither the directors of a corporation, nor even a majority of its stockholders, have any authority to diminish its prescribed capital by distributing a portion among the shareholders in the shape of dividends. This would be a fraud upon creditors contracting with it on the faith of its capital stock. (p. 540.)

**CORPORATIONS—Unlawful Dividends.**—Shareholders in a corporation are not permitted to distribute its capital among themselves under the guise of dividends when they are indebted to the corporation on their unpaid liability on the stock subscription. (p. 542.)

**CORPORATIONS—Unlawful Dividends—Setoff.**—If the notes of a corporation which its officers as indorsers have paid were the result of a fraudulent reduction and distribution of the capital stock of the corporation under the guise of dividends, the court will not in an equitable suit by a judgment creditor of the corporation against its stockholders to subject to his debt the unpaid balance of paid-up stock issued to them, set off the amount thus paid on such notes against the balance remaining unpaid on the stock of the officers paying them. Such preference given to the officers themselves is *prima facie* fraudulent, and the burden rests on them to show that such notes were honest obligations of the corporation. The mere production of the notes executed, indorsed and paid by themselves, falls far short of that proof which a court of equity requires to overcome the presumption of fraud. (p. 543.)

**CORPORATIONS—Conversion of Stock—Presumption.**—If a large part of the capital stock of a corporation is shown to have been illegally converted by its managing officers, it must be presumed, in the absence of a full explanation by them, that the whole of the stock has been by them fraudulently converted. (p. 543.)

Heffernan & Heffernan and W. G. Pettus, for the appellant.

B. W. Massey, A. Sherwood and W. M. Williams, for the respondents.

**505 GANTT, J.** On or about the last days of February, 1887, Lucius Hubbell of the real estate firm of Wooley, Porter & Hubbell of Springfield, Missouri, for one thousand dollars cash paid, obtained an agreement from George M. Jones to convey to said Hubbell a tract of land adjoining the city of Springfield, containing about one hundred and sixty acres, for the sum of \$26,000, to be paid in thirty days. Before the expiration of the thirty days said Hubbell obtained the agreement of nine other parties to share said purchase with him, each to pay the sum of \$2,600, and together they paid the \$26,000, and on March 29, 1887, said Jones conveyed the said land to said Hubbell. It was further agreed between the ten purchasers that they would organize a business corporation to take over said land and that it should be capitalized at \$100,000 and each of said

ten purchasers should receive stock in said company of the par value of \$10,000.

On March 31, 1887, these same ten men signed and executed articles of association of the Real Estate Investment Company, reciting therein that the capital stock of \$100,000 had been fully paid up and was in the hands of the persons named as the first board of directors and that each of the ten signers, to wit, L. W. Hubbell, W. H. Biggs, George A. C. Wooley, W. O. Gray, E. D. Pearce, T. E. Burlingame, J. S. Ambrose, B. F. Hobart, J. T. Gray and W. G. Porter, Jr., held twenty shares of the par value of \$500 each. Articles of incorporation were duly filed and a certificate of incorporation granted, and in due time stock of the par value of \$10,000 was issued to each of said parties as fully paid. The testimony of Hubbell, the promoter, and of Biggs, one of the original board, and of Ramsay, the manager, establishes beyond question that none of these stockholders ever paid anything for their stock except the \$2,600 which they each paid into the fund to buy the land, which was at once conveyed to the corporation on its organization by Hubbell for a recited consideration of \$100,000, and which land was practically the <sup>506</sup> only asset the company ever had outside of a switch and a few lots purchased by it later on. As soon as practicable the company caused the land to be laid off as an addition to Springfield, conforming as near as possible to the streets of the city, and filed its plat and published maps of the addition. This was accomplished in September, 1887. The lots were rated from \$150 to \$400 each, according to desirability.

The testimony of Hubbell and Ramsey, who were the managers at different periods, disclose the following *modus operandi*: The company would sell a lot, and if the purchaser was not able to build would advance him the money or materials for his house, and then take back notes, or real estate bonds, as one of the witnesses denominated them, secured by a first deed of trust on the whole, and then the company would indorse this paper and sell it in the money market. In this manner something like one hundred and eighty lots were sold in the first three or four years of the company's existence, or up to 1891 or 1892. The money received from the sale of these notes, and sometimes the notes themselves, were distributed as dividends to the corporators or stockholders to the amount of \$26,000 or near that sum, but the evidence shows that a large number of those notes were not paid by the makers or owners

of the lots when due, and as Hubbell testified, "it was not the policy of the company to allow them to default, and when the purchasers of the lots failed to make payment the company stepped in and paid them so as to keep its paper good," and it would seem that to get the money to do this from time to time, the company would make its notes, indorsed by the directors and the banks of Springfield and St. Louis, and when due would renew again, until toward the last Hobart and Ambrose were compelled to pay them to protect their indorsements.

In some instances the company would mortgage the property to raise the money and take second mortgages, but when the panic of 1893 came, the second <sup>507</sup> mortgages were wiped out completely by the decline in values.

Ramsay testified that when he became manager in 1891 there was from \$12,000 to \$18,000 of the company's paper outstanding indorsed by Hobart and Ambrose, who were directors of the company, and in 1893 it had increased to about \$34,000, which came about by paying off interest on the indebtedness, and on account of notes coming back on the company which it had indorsed, and paying the running expenses, and taking up the old notes that had been indorsed.

In February, 1893, the company issued its notes secured by deeds of trust on unimproved lots, for \$10,000, which it sold through the brokerage firm of H. M. Noell & Co., of St. Louis, \$5,000 to plaintiff George H. Shields, and \$5,000 to Mrs. Breed. Default was made in the payment of these notes, the deeds of trust foreclosed by sales, and thereupon plaintiff brought suit in the Greene circuit court and obtained judgment for \$6,055.50, the balance due him on the notes held by him. Execution issued on this judgment and real estate which had theretofore belonged to the company, but which had been sold under other deeds of trust of August 19, 1893, and plaintiff became the purchaser and the execution was credited with \$158.10, the proceeds of the sale.

The five deeds of trust of August 19, 1893, had been made by the company, covering all the land it then owned, to secure certain notes which it had put up as collateral to its notes already outstanding, which had been indorsed by Hobart and Ambrose, and in some instances by the other directors and stockholders. Hobart and Ambrose were ultimately compelled to pay the notes which they had indorsed, and thereupon caused these collateral deeds of trust to be foreclosed, on September 23, 1897, and Ambrose got sixty of the one hundred and forty lots

covered by these deeds of trust for \$2,005, and Hobart bid \$1,100 on certain of the lots and directed them to be conveyed to the Crescent Iron Company, and <sup>508</sup> for certain other lots he bid \$2,819 and caused them to be deeded to Mrs. Hobart, his wife, these sums being credited on their notes against the company which they had paid for it.

It appears that Hobart in this way paid \$17,243.10 and Ambrose \$6,310. Hobart also produced another note for the company for \$1,000 which he loaned the company. The plaintiff in his endeavor to trace the origin of all this indebtedness endeavored to get at the books; but the defendants did not produce them, and it appeared that Ramsay, the manager of the company, when he learned the plaintiff intended to levy on them and had applied for an order to produce them, called in the negro porter, Henry Reed, at the Ozark Hotel in Springfield, and turned over to him the journal, cash-book, ledger, sales-book and stock-book, which contained all the transactions of the Real Estate Investment Company for the years up to November, 1897, saying to the negro at the time they would probably be attached and to get them out of his office, he didn't care what he did with them; so he took them out of his office, and when on that day the order of the court to produce them was read to him or delivered to him, he made return that they were not in his possession.

The negro testified he put them in an elevator where the rubbish around the Ozark House was dumped and they remained there several days, when he was taken sick, and upon his return to work, they had been removed, and he did not know their whereabouts. The witness Ramsay boldly avowed his purpose to prevent plaintiff getting the information contained in the books, and says he wrote Hobart that day what he had done and received an acknowledgment of the letter. With the suppression of the books came a significant lapse of all memory of their contents by those who conducted the transactions recorded in them. Ambrose was dead at the time of the trial and was represented by his administrator.

H. M. Noel testified that he lived in St. Louis; was in the bond and brokerage business, and that Hobart <sup>509</sup> sold him the \$10,000 in bonds, which witness sold to plaintiff Shields and Mrs. Breed; that Hobart informed him at the time that the bonds were amply secured, and only forty per cent of the realty belonging to the Real Estate Investment Company was mortgaged; that the company was solvent; that part of the \$10,000



was to pay a note falling due and the remainder to be paid in betterments.

Hobart was present in court and sworn as a witness, but was not offered as a witness in his own behalf to explain the origin of the debts which he paid for the company until counsel for plaintiff in his argument animadverted upon his said failure and then he was offered as a witness, but the court declined at that time to reopen the cases.

Other facts may be noted in the opinion in the case. The circuit court found for defendants Hobart and Ambrose and against the other defendants.

Cause No. 9411 is a suit in equity by plaintiff, as a judgment creditor of the Real Estate Investment Company, against the defendants, who were seven of the original ten subscribers to and promoters of the said corporation, to subject to plaintiff's judgment the unpaid balance due from the defendants on their stock, on the ground that although stock was issued as paid up they had in fact paid only twenty-six per cent thereon, and they were liable to plaintiff as a creditor to the full amount thereof.

The circuit court found as a fact that only twenty-six per cent was paid on the stock; that each of the stockholders was liable for \$7,400 for the satisfaction of the company's debts, but found that as to Hobart and Ambrose they had paid more than they owed on their stock in paying their indorsements on the notes of the company, as set forth in the statement and answers of Hobart and Bigbee, administrator of Ambrose.

After timely motions for new trial and in arrest plaintiff appealed from the judgment of the circuit court.

**510** 1. The circuit court's finding that of the \$100,000 of capital stock of the Real Estate Investment Company subscribed, the stockholders only paid into the treasury of the company \$26,000 or \$2,600 each for the \$10,000 worth of stock at par value allotted to them, is supported by all the testimony in the case, and it follows that under the laws of this state the court's further finding, that each of the defendants in the cause No. 9411 was liable to the creditors of the corporation for the unpaid balance of \$7,400 on his twenty shares, followed as a necessary consequence: *Shickle v. Watts*, 94 Mo. 414, 7 S. W. 274; *Liebke v. Knapp*, 79 Mo. 24, 49 Am. Rep. 212; *Shepard v. Drake*, 61 Mo. App. 134; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743.

But the circuit court further found that by the payment of the various notes issued by the corporation, Hobart and Ambrose had each subsequently more than paid the unpaid balance on their respective shares and credited them with these payments and rendered judgment for them against plaintiff, while giving him judgment against the other defendants, and it is this judgment of the court in favor of defendants Hobart and Ambrose's administrator which forms the basis of this appeal.

As already stated, this is a suit in equity which is a concurrent remedy with the statutory action at law given by section 2519 of the Revised Statutes of 1899, in force when this suit was commenced and the judgment rendered: *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743; *Steam Stone Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076.

It is not necessary to enforce a stockholder's liability for his unpaid obligation for his stock to allege or prove fraud. This was ruled in *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274, and while a different view was taken in *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432, so much of that opinion as announced that it was necessary to allege fraud was overruled and disapproved in *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, by the unanimous opinion of all the judges in <sup>511</sup> *Bank*, and it must now be regarded as settled that it is not necessary to charge fraud to subject the stockholder's unpaid liability to a creditor's judgment against the corporation.

The difficulties of the case arise from the uncertainty as to the origin of the debts which Hobart and Ambrose paid for the company.

These two defendants contented themselves with showing that in 1893 and prior thereto they had indorsed the company's notes or real estate bonds in the aggregate to the amount of \$23,350, and that to protect the several notes of the company which they had indorsed, one for \$3,000, one for \$1,350, one for \$2,000, one for \$9,000, and one for \$8,000, the company made its additional notes for these several amounts to Frank B. Smith and gave five deeds of trust conveying one hundred and forty lots of ground and these notes were indorsed by Smith and, together with the respective deeds of trust given to secure each, were placed by the company as collateral security with the several banks and individuals who held the notes of the company indorsed by Hobart and Ambrose, and to secure the latter on their said indorsements.

The plaintiff endeavored to trace the origin and consideration of the notes indorsed by Hobart and Ambrose and in a general way, we think, established that a large proportion of this indebtedness grew out of the way in which the corporation conducted its affairs. He established quite conclusively by Hubbell, the manager of the company from 1887 to 1891, that it was the custom of the company to sell its lots, which constituted in fact its capital, to various purchasers on credit, or largely so, and take notes and deeds of trust to secure the purchase money, and to either sell these notes and distribute the proceeds as dividends or distribute these notes with the company's indorsement to the several stockholders as dividends. Many of these notes thus sold and divided as dividends were not paid by the makers, the purchasers of lots, when they became due, and the company to protect its credit would take up and <sup>512</sup> pay these notes by borrowing money or using the proceeds of other lots.

How many of these defaults occurred during Hubbell's management does not satisfactorily appear, as his memory was very indistinct when questioned on that subject, but they grew more and more frequent under Porter's and Ramsay's management in 1891, 1892 and 1893, by which time the indebtedness had grown on this account, principally to the bulk of its indebtedness, some \$34,000, at the time it made the bonds for \$10,000 of which the plaintiff became the owner of \$5,000 in 1893. Ramsay says it was between \$12,000 and \$18,000 when he took charge in 1891. Plaintiff endeavored to reach the books, but when Ramsay, the manager, learned of his purpose he called in a negro porter and turned them over to him with the sole injunction to get them out of his office, and when the order of the court was served he answered these books were not in his possession. All efforts to trace the whereabouts of these books which contained a history of all the transactions of the company proved futile, and this accounts for the failure of the plaintiff to show definitely and specifically the origin of the indebtedness on which Hobart and Ambrose were indorsers and for the payment of which they claim credits on their stock and offsets against their liability to plaintiff.

During all this time Hobart was a director of the company, and Ambrose was the president, until his death in 1897, and long after the corporation ceased to be a going concern. So that plaintiff could only show, as he did generally, that the corporators divided about \$26,000 among themselves, the proceeds of the company's lots, but a large proportion of which

constituted a liability of the company on account of its guaranty of the notes, and not properly a dividend earned. The defendants Hobart and Ambrose could have preserved the books of the company and shown the origin of every debt. After 1891 no dividends were paid. Hubbell testified the stockholders got back in dividends the amount they invested, or about \$26,000; that "we sold <sup>513</sup> notes, the bonds that we received in payment of the lots," and in some instances divided the bonds themselves as dividends. "Got very little money for the lots. Took notes and guaranteed their payment."

Judge Biggs testified he received his dividend in both cash and notes, and collected the latter. He testified that according to the original understanding the company ought not to have been compelled to issue paper or indorse paper for any purpose.

No reasonable or rational evidence appears in the record to account for so large an indebtedness as was incurred by the company upon any other theory than that disclosed by Hubbell and Judge Biggs, and that is, that the indebtedness largely, if not altogether, grew out of the indorsement and guaranty of the company of the notes and real estate bonds it took from purchasers of its lots, and their default in paying the same, and the interest accumulating thereon.

With ample opportunity to have rescued the records of the company when notified by the manager, Ramsay, that he had turned them over to an utterly irresponsible character, and to have condemned his conduct in suppressing evidence to which plaintiff was entitled, Hobart so far as the evidence shows, permitted the records of the company to lie in the dump pile in the elevator of the Ozark Hotel without a request to Ramsay to secure them.

In those books, presumptively, the origin of each note which he and Ambrose indorsed for the company and each renewal thereof, could have been traced.

Those books also were or should have been the repository of all the corporate acts of the company, and would have disclosed whether the corporation, through a lawful board, authorized the creation of said debts or the indorsement thereof by the company's directors; in short, whether these arrangements were the individual acts of Hobart and Ambrose self-imposed or were lawful acts of the corporation.

<sup>514</sup> That a corporation while a going concern may prefer one creditor to another must now be accepted as the law of this state: *Foster v. Muilanphy etc. Mill Co.*, 92 Mo. 87, 4 S.



W. 260; Meyer v. American Folding Chair Co., 130 Mo. 188, 32 S. W. 300; Schufeldt v. Smith, 131 Mo. 280, 52 Am. St. Rep. 628, 31 S. W. 1039.

But it is also settled by our adjudications that when a corporation has reached a point where its assets are insufficient to satisfy its corporate debts, its managing officers cannot lawfully pay their private debts from the assets as against the claims of existing creditors of the company, who complain. As to the latter such a transaction is *prima facie* fraudulent: National Tube Works v. Ring etc. Machine Co., 118 Mo. 365, 22 S. W. 947; Hall v. Goodnight, 138 Mo. 576, 37 S. W. 916. With these principles in view, it is essential to a proper determination of the respective rights of the parties to this litigation to ascertain, if we can, the true character of the offset which is presented against plaintiff's judgment.

Plaintiff judgment being founded upon a note executed by the president of the company as such, and having been adjudged the debt of the corporation, is not open to attack in this proceeding by the defendants who are officers and stockholders of that company, and indeed is not questioned, and he has a right to have it satisfied out of any assets belonging to said company.

On the other hand, notwithstanding defendants Ambrose and Hobart only paid \$2,600 each on their subscription for their stock of the par value of \$10,000 each, under the rule announced in Washington Savings Bank v. Butchers etc. Bank, 130 Mo. 155, 31 S. W. 761, in an equitable suit by a judgment creditor of a corporation against a stockholder to subject the stockholder's liability for the balance unpaid on his stock, the stockholder may set off a demand which he has against the corporation.

In that case it appeared that at the suit of one stockholder the defendant stockholder had been compelled to pay the full amount of his unpaid subscription, and it was held to be a full satisfaction of his liability.

**515** We are thus brought to the contention of the plaintiff that the notes and bonds offered by defendants Hobart and Ambrose were not lawful claims against the corporation, but were the result of a fraudulent and unauthorized reduction and distribution of the capital stock of the company under the guise of dividends, and that the preference which they gave themselves out of assets of the company over plaintiff who was an existing creditor, is *prima facie* fraudulent, and the burden devolved upon them of showing that all their secured debts were

fair, honest obligations of the company and justly due them, and that they made no such showing.

In *National Tube Works v. Ring etc. Machine Co.*, 118 Mo. 376, 22 S. W. 948, this court quoted with approval the statement of Morawetz on Private Corporations, volume 2, section 789, that: "A corporation cannot give away its property or transfer it, unless in good faith for value, if its creditors would thereby be left unsecured." What, then, is the nature of the debts which defendants Hobart and Ambrose propose to set off against plaintiff's judgment and how did they originate?

As already said, a large part thereof grew out of the sale of notes held by the company and by it indorsed to raise money to distribute as dividends and in some cases by the distribution of these notes without sale as dividends, and their makers having defaulted the company borrowed money to make them good and to keep up its credit.

It was for this money thus borrowed that the defendants became indorsers and finally paid these sums for which they ask offsets. If these notes were founded upon other lawful debts of the corporation, the law cast the burden on defendants to show that fact and what part of the notes, if any, originated outside of the indorsement of the so-called dividends.

They could have protected their records from spoliation and presumably have shown how every item of the debt thus originated, and being directors and trustees of the corporation, were bound to know how its <sup>516</sup> liabilities accrued and upon what basis they assumed to declare dividends, and why it was necessary, if they had earned sufficient profits over and above all liabilities to declare dividends, for the corporation to indorse and guarantee the paper of the purchasers of its property, but they have not done so and have contented themselves with offering in evidence notes signed by one of them, Ambrose, as president, and indorsed by the other, Hobart, who was a director, without showing that these notes were the legal obligations of the company for debts which it might properly contract. Having the power to show these notes were not, as the evidence tends to show, the result of distributing the capital as dividends, and failing to do so, we feel justified in starting with the assumption that this was their origin.

The statute governing business corporations like this at the time these transactions occurred, section 2773 of the Revised Statutes of 1889, provided: "Dividends of the profits made by the corporation may be declared by the trustees or directors

thereof every six months, or oftener, as the directors may elect; but no such dividends shall be made and paid to stockholders while such corporation is in an insolvent condition; and if the directors of any such corporation shall knowingly declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be thereafter contracted while they shall respectively continue in office; provided, that if any of the directors shall object to the declaring of such dividend, or to the payment of the same, and shall, at any time before the time fixed for the payment thereof, file a certificate of their objections, in writing, with the clerk of the corporation and with the circuit clerk of the county they shall be exempt from the said liability."

**517** Independently of this statute, which gives creditors an additional security against directors, it is a fundamental rule that dividends can be paid only out of profits or the net increase of the capital of a corporation and cannot be drawn upon the capital contributed by the shareholders for the purpose of carrying on the company's business.

Neither the directors of a corporation, nor even the majority of the stockholders, have any authority to diminish the prescribed capital of the corporation by distributing a portion of it among the shareholders in the shape of dividends, for this would be a fraud upon creditors contracting with it on the faith of its capital stock.

Wood v. Dummer, 3 Mason, 308-311, Fed. Cas. No. 17,944, was a suit in equity brought by the unpaid creditors of a bank against the shareholders thereof upon the ground that the bank, while insolvent, had divided three-fourths of its capital stock amongst the defendants, leaving the plaintiff's debt unpaid. Justice Story ruled that the defendants were liable to refund so much of the assets received by them as was necessary to pay creditors, saying: "If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any persons having notice of the trust attaching to it. As to the stockholders themselves, there can be no pretense to say, that both in law and in fact, they are not affected with the most ample notice": 2 Morawetz on Corporations, sec. 790; Union Nat. Bank v. Douglass, 1 McCrary, 86, Fed. Cas. No. 14,375.

Dividends can only be properly declared from the profits over and above the capital stock and the debts of the company: *Barry v. Merchants' Exchange Co.*, 1 Sand. Ch. 307; *Williams v. Western Union Tel. Co.*, 93 N. Y. 162.

Now, the capital stock of the Real Estate Investment Company was \$100,000, of which only \$26,000 was paid into the treasury, though the stockholders and incorporators certified the whole amount was paid into the treasury and was in the custody of its directors. The trial court <sup>518</sup> had no difficulty in finding that as a fact only \$26,000 was ever paid in, and that was invested in the one hundred and sixty acres of land bought from Captain Jones.

Knowing absolutely that they never had paid up the capital stock, but owed \$74,000 of it, the evidence is absolutely conclusive that when this company had sold (principally on credit, as Hubbell, the manager at that time, says they got "very little cash") about one hundred and eighty lots for about \$300 a lot or \$54,000 in all, and when it was wholly problematical what amount of money they would realize out of these sales, and the sequel shows they did not receive over half of that sum at any time in actual cash for these lots, these directors proceeded to distribute the proceeds of these sale notes as dividends to the amount of \$26,000 and had the corporation guarantee their payment. By no system of bookkeeping could this \$26,000 be said to be profits under the facts brought to light on the trial.

Not only was it not in excess of the capital stock of \$100,000 but if it had been added to the \$26,000 paid in, it would only have swollen the whole assets to \$52,000, making no deduction for the corresponding diminution of the actual capital which was all invested in the lots, of which one hundred and eighty were sold to produce the \$26,000 in dividends. This action of the directors in thus diminishing the capital stock was in defiance of the law of corporations.

While a corporation may with "the consent of its stockholders on proper notice reduce its capital stock," it is not pretended that the capital stock of this corporation was reduced after due notice as required by the statutes of this state. The result, however, was reached by the distribution of these sale notes and their proceeds, which were but another form in which the capital of the corporation was invested.

It is contrary to fundamental principles to permit shareholders to distribute the capital of a corporation among themselves. But this was exactly what was attempted by the di-



rectors and managers of this company under the guise of dividends, and that, too, when <sup>519</sup> each of the stockholders was indebted to the corporation in the sum of \$7,400 on their unpaid liability, and the illegality becomes more pronounced when we consider that they did not in fact have the money but merely the promises of the purchasers to pay, and to insure the stockholders getting the money the directors indorsed these notes in the name of the corporation, and thus compelling it when the purchasers defaulted to further deplete the capital by incurring debts to make good these unauthorized conversions of its capital.

It was these notes which the defendants Ambrose and Hobart signed, and thus and in this way they assert the company became indebted to them, and that they are entitled to offset that indebtedness against a judgment creditor who had no notice of their methods of business.

In our opinion a debt thus created, however equitable it might be as to the shareholders who took their share of the capital with full knowledge of the scheme, is not such a claim against the company as can be offset against a judgment creditor. To permit it would sanction the distribution of the whole capital among the directors and stockholders at the expense of the creditors who have a right to look to the capital stock and assets of the company to satisfy their claims.

While it must be conceded that the exact amount of the notes which were sold and guaranteed as dividends, and which subsequently fell back on the company and were paid by it by borrowing money with the indorsement of the directors, is not specifically established, this is no fault of plaintiff, as he was diligent in his endeavor to throw all the light obtainable on the transactions, but was prevented by the intentional suppression of the books, and the burden was not on him but on the defendants Hobart and the administrator of Ambrose who pleaded the setoffs of debts which they alleged they held against the company. In the creation of the five deeds of trust which swept away the great bulk of the unencumbered lots, they had <sup>520</sup> their private interest at stake to protect their indorsements which seem to have been voluntarily made by them, and in such cases their acts are subject to the most rigorous scrutiny: *Hill v. Rich Hill etc. Mining Co.*, 119 Mo. 9, 24 S. W. 223, and cases cited.

The trust relation which they bore to the corporation requires courts of equity to subject the preferences which they take to themselves to the most searching scrutiny and places upon de-

fendants the burden of showing beyond question that they held bona fide, honest and just claims against the corporation which can be allowed as setoffs: *Schufeldt v. Smith*, 131 Mo. 290, 52 Am. St. Rep. 628, 31 S. W. 1039.

Prima facie they are fraudulent as against the creditors, and they are in no attitude to complain that plaintiff has not made that absolutely clear and certain which they had the opportunity and means of showing, but which they failed to show and even declined to testify. The mere production of notes executed and indorsed by themselves falls far short of that proof which a court of equity requires to overcome the presumption of fraud. The plaintiff showed that a large part at least was tainted with an illegal conversion of the capital to which he had a right to look, and where a part is fraudulent the whole may well be presumed to be in the absence of a full explanation.

The trial court properly found that in the absence of these setoffs, Hobart and Ambrose's estate each was indebted to the amount of \$7,400 on their unpaid liability on their stock subscriptions, and while it found they had paid more than this balance, subsequently, it did not find that these payments were for honest, just, bona fide debts of the corporation, which would have sustained their preferences and constituted valid setoffs, and as this appeal is on the equity side of the court, we are not bound by the conclusion reached by the circuit court.

In our opinion it erred upon the facts proven in not rendering judgment against Hobart and the estate of Ambrose that they were liable each for the unpaid <sup>521</sup> balance of \$7,400 on their stock, and that plaintiff was entitled to have his judgment satisfied out of said liabilities as well as against the other stockholders defendants, and the judgment is reversed with directions to so enter the decree.

All concur.

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*The Property of an Insolvent Corporation* is a trust fund in such a sense as to preclude its officers dealing with it so as to secure preferences to themselves: See the monographic note to *Buck v. Ross*, 57 Am. St. Rep. 77-84; *Durlacher v. Frazier*, 8 Wyo. 58, 80 Am. St. Rep. 918, 55 Pac. 306; *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 74 Am. St. Rep. 841, 79 N. W. 51.

*Unpaid Subscriptions to Capital Stock* constitute a trust fund for the benefit of creditors of the corporations; and their rights cannot be defeated by a simulated payment of the subscriptions, nor by any device short of an actual payment in good faith: See the monographic note to *Buck v. Ross*, 57 Am. St. Rep. 66-70; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057.

*A Stockholder's Right of Setoff*, when his liability to creditors is attempted to be enforced, is considered in Cahill v. Original Big Gun etc. Assn., 94 Md. 353, 89 Am. St. Rep. 434, 50 Atl. 1044; Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; monographic note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 871.

CASES  
IN THE  
COURT OF APPEALS  
OF  
NEW YORK.

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BRANTINGHAM v. HUFF.

[174 N. Y. 53 66 N. E. 620.]

**ADOPTION—Parol Evidence to Vary Contract of.**—A contract of adoption which appears on its face to fully specify the duties of the child and of the persons adopting it, cannot be varied or added to by parol evidence to the effect that such persons, before the contract was entered into, orally agreed to leave their property to the child on their death. Such parol agreement, assuming it to have been made, merged in the written contract. (p. 551.)

**EVIDENCE, Parol, When Admissible.—To Authorize the Admission of Parol Evidence to Complete an Agreement,** it is essential that the writing appear upon inspection to be an incomplete contract, and that such evidence be consistent with, and not contradictory to, it. (p. 551.)

David B. Hill, W. P. Prentice and R. K. Prentice, for the appellant.

Alexander Thain and Burton Thompson Beach, for the respondent.

55 HAIGHT, J. This action was brought to compel the specific performance of a contract alleged to have been made by Joseph Thorne and his wife, with one Mary Lillie Lee, the mother of the plaintiff, in the city of New York on the twenty-first day of December, 1863, for the adoption by said Thorne and wife of the plaintiff, who was then an infant of the age of one year and eleven months.

The complaint alleges that Thorne and his wife agreed to consider the plaintiff as their heir at law and next of kin, and that at their death she should have such property as they might then have to dispose of; that thereupon a written contract of



adoption was drawn and executed between the mother of the plaintiff, Thorne and his wife, and one George Kellock, superintendent of the poor, who signed for and on behalf of the infant, the plaintiff herein, with the consent and approval of the board of charities and correction indorsed thereon. Performance of this contract is alleged on behalf of the plaintiff; and further that Joseph Thorne died in April, 1897, leaving a last will and testament, executed on the twenty-third day of July, 1896, which had been duly admitted to probate, in which he devised all of his real estate to his nieces, Bessie, Louise and Martha Jackson, and bequeathed a legacy of one thousand dollars to his friend, Dr. Willard Parker Beach, and all of the residue and remainder of his estate to the defendant, Eunice Eleanor Huff, appointing her and his friend Beach executrix and executor of his will.

The complaint further alleges that the said Joseph Thorne formed the acquaintance of the defendant, Eunice E. Huff, in May, 1895, and that shortly thereafter he became of unsound mind, and so continued until the time of his death; that the defendant Huff acquired an improper influence over him, separated him from his wife, and would not permit him to be visited by the plaintiff or his friends, and that said Huff procured him to purchase and deed to her two parcels of real <sup>56</sup> estate specifically described, and to give to her the custody of his personal property amounting to "several hundred thousand dollars," and to bequeath the same to her by his last will and testament. It is alleged that this was done in fraud of the plaintiff's rights, under her contract.

The trial court in its decision confirmed the devise of the real estate by Thorne to his nieces and of the legacy of one thousand dollars given to Beach, but held that the bequest of the personal property to the defendant Huff, as well as the conveyance of the two parcels of real estate mentioned, was void; and judgment was ordered to be entered against her requiring her to convey and turn over such real estate, together with the personal property of Thorne, to the plaintiff, who, under the contract, was entitled thereto. It appears that Mrs. Thorne died before her husband, Joseph Thorne, and that he had no children or heirs at law other than the nieces already referred to. Upon the trial of the action the plaintiff, in order to establish her cause of action, read in evidence the deposition of her mother, which she had procured to be taken upon commission in London, England, in which it appears that at the time

the plaintiff was adopted by the Thornes in 1863, the mother was living in New York and was sick and without means; that while in this condition she was visited by Mr. and Mrs. Thorne. She, then lying ill in bed, and in the presence of Dr. Beach who was then attending upon her, states that the following conversation took place: "I said to them, 'You seem to be very nice people but you are only working people, and I would rather have people in a better position to bring up the child. Dr. Beach thereupon said I might rest quite contented that Mr. Thorne was much better off than I had any idea of, and that they were very estimable people, although he said Mr. Thorne was not a member of the Episcopal church. Then Mr. Thorne said, 'You will find that May will be well taken care of in every possible way. She will have everything that is ours, and should I die first, I will see that May is left well off. We have no children of our own and no relations to leave my money to, and she will be <sup>57</sup> exactly treated in every way as if she were our own child.' Mrs. Thorne acquiesced exactly in everything her husband said. . . . She did not say much. She was a very silent woman—a woman of very few words. After hearing what they had said, and on Dr. Beach's recommendation, I told the Thornes that they might have May, who was incorrectly styled in this and other interrogatives as Mary. When I had given my verbal consent, Dr. Beach said that there would have to be a legal paper drawn up and signed by all parties concerned. Then Mr. and Mrs. Thorne and Dr. Beach went away."

In answer to cross-interrogatory she further states that she signed the indenture, under which Thorne and his wife adopted May, and thinks it was witnessed by Dr. Beach and that it was executed some days after the conversation alluded to. She does not remember that George Kellock nor Simeon Draper were present at the interview. Before reading the deposition above quoted, the defendant objected to it as incompetent under the code, as relating to the transaction between the witness and the testator and as generally incompetent and irrelevant. This objection was overruled and an exception was taken by the defendant. After it was read the defendant moved to strike out the entire answer, it being apparent that it was but a preliminary verbal agreement followed by a complete written agreement which embodied the understanding between the parties. This motion was denied and an exception taken. A motion was also made to strike out of the answer the following words: "She will have everything that is ours, and should I die first, I will

see that May is left well off," as not being within the allegations of the complaint. This motion was denied and an exception also taken.

The indenture or contract alluded to in the deposition appears to have been drawn on a printed form or blank in use by the commissioners of charities by the filling in of the names and dates, etc., in the blank spaces left therefor. It contained provisions by which May Lee, aged one year and <sup>58</sup> eleven months, was adopted by Joseph Thorne and Elizabeth, his wife, who resided at No. 40 Fifth street in the city of New York for the period of sixteen years and one month next ensuing, thus making the child eighteen years of age. It contained provisions pointing out the child's duty to the Thornes, and also other provisions prescribing the duty of the Thornes to the child; in which they undertook and agreed to cause her to be instructed in reading, writing and arithmetic, and also in the trade and mystery of housekeeping and of plain sewing, and to provide her with sufficient meat, drink, apparel, mending, lodging and washing; together with all necessary and proper medical attendance and nursing, and the utensils and articles required to keep her healthy and cleanly; and upon the expiration of the term—that is, upon her arrival at the age of eighteen years—Thorne was to give her a new Bible and a new suit of clothing in addition to her old ones in wear. He further agreed to report to the commissioner of public charities and correction, once in each year, the character and condition of the girl. It further contained a covenant of faithful performance, and was executed on the twenty-first day of December, 1863, under seal, by May Lillie Lee, Joseph Thorne, Elizabeth Thorne and George Kellock, superintendent of the poor, for May Lee, and witnessed by H. W. Boswell. Upon this instrument, under date of New York, December 23, 1863, was indorsed the consent and approval of the board of commissioners of public charities and correction, signed by S. Draper, president, and attested by Isaac Bell, secretary.

Numerous questions have been raised and discussed upon the argument of this appeal, but in our consideration of the case we shall limit our discussion to the competency of the oral evidence of the plaintiff's mother, under which the plaintiff claims to have established the contract alleged in the complaint.

Under the Laws of 1873, chapter 830, provisions were made for the adoption of minors by adult persons under which the child became entitled to all of the rights and subject to all of

59 the duties of the relation of parent and child, except the right of inheritance. But, subsequently, under the Laws of 1887, chapter 703, this provision was amended so as to confer upon children thereafter adopted the right of inheritance. These provisions remained in force until the enactment of the domestic relation law, chapter 272, Laws of 1896, sections 60 to 68. It is thus apparent that the contract of adoption did not operate to give to the plaintiff the right of inheritance of the property of which her foster parents died possessed: *Matter of Thorne*, 155 N. Y. 140, 49 N. E. 661. The plaintiff's right, therefore, to recover in this action must rest upon the alleged oral contract. The contract as found by the trial court is that Joseph Thorne "at the time and place in the complaint stated, made an agreemnt with the widowed mother of the plaintiff and for the benefit of the plaintiff, then an infant, whereby said Joseph Thorne undertook and agreed upon sufficient consideration to devise and bequeath all his real and personal property to the plaintiff." Assuming this to be the contract, as we must under the unanimous affirmance of the appellate division, we find the trial court disregarding it by confirming the devise under the will of the real estate to the testator's nieces, and also of the bequest of the one thousand dollars to his friend Beach. In order to confirm these dispositions of his property the trial court must have been satisfied that he was at the time sane and possessed of sufficient capacity to make a will.

As we have seen, the contract was made on the twenty-first day of December, 1863, over thirty-nine years ago. The plaintiff's mother is the sole person who has given us an account of that transaction. And what is that account? She testified that Mr. Thorne said, "You will find that May will be taken care of in every possible way." That expression undoubtedly referred to her care and maintenance during the time that they were bringing her up to the period of eighteen years of age. Then follows the statement, "she will have everything that is ours." This statement evidently referred to the same period of time during their joint lives in which she was to 60 have the use of everything that they had for use in their family. Then he is claimed to have said, "Should I die first, I will see that May is left well off. We have no children of our own and no relations to leave my money to, and she will be treated in every way as if she were our own child." The trial court has made no finding as to whether or not the plaintiff was left well off. Thorne had built her a house and Mrs. Thorne had remembered



her in her will, but as to the extent that she had been provided for we are not advised. The statement of Thorne to the effect that he had no relations was not strictly true, for it appears that he did have nieces. His statement to the effect that she would be treated in every way as if she were his own child does not necessarily import a promise to devise all of his real estate and personal property to her, for a parent may, in the exercise of his judgment, by last will and testament, cut off his own child and deprive him of the right to inherit any part of his estate.

Again, we have the written contract executed after the conversation took place as detailed by the mother, drawn in pursuance of the statement of Dr. Beach made after the oral arrangement testified to, to the effect that "there would have to be a legal paper drawn up and signed by all the parties concerned." This paper limits the time during which the relation between the Thornes and the plaintiff was to continue to the period of sixteen years and one month, that being the time that she would arrive at the age of eighteen years. It did not continue their relations longer. The duties of Thorne to the child are fully specified, including what should be given to her upon her arrival at that age. It appears to be full and complete, and when we recall the statement of Dr. Beach, immediately following the oral agreement, it would seem that the parties must have intended to have incorporated in the written document the agreement made. We have thus analyzed the testimony of the plaintiff's mother and called attention to the contract for the purpose of showing that the case is brought within the rule of law, which, we think, it is our duty to invoke in this case, and that is, that the oral agreement testified <sup>61</sup> to by the mother must be deemed merged in the written contract, and, so far as her evidence tends to impeach, change or alter that instrument, it was incompetent.

The cases chiefly relied upon by the plaintiff in the support of her contention are those of *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 617, 59 N. E. 832, and *Healy v. Healy*, 166 N. Y. 624, 60 N. E. 1112. In the *Winne* case the agreement to make the child a sole heir and to give him all the property was embraced in a written contract. In the *Healy* case there was no written contract, but in that case we were precluded from a review of the evidence by reason of the unanimous affirmance of the judgment by the appellate division. It was affirmed in this court upon the opinion delivered in the *Winne* case, and in that case *Martin, J.*, concludes his opinion for affirmance of the

judgment, under the peculiar circumstances of that case, by remarking, "Yet, it must not be regarded as an authority for maintaining such an action under different circumstances or upon other proof." It will readily be seen that these cases have no bearing upon the legal question now presented. In neither of those cases was there an oral agreement which could be merged into a written agreement, or an oral agreement that attempted to vary the terms of the written agreement.

We now have a case raised under different circumstances and based upon other proof than that under which the Winne case was disposed of. In the face of the instrument by which the mother surrendered the custody and control of the plaintiff for a limited period only, and Thorne undertook to adopt her and take care of her for such period, evidence was admitted of a verbal agreement made at or before the execution of the contract under which Thorne is claimed to have agreed to make the child his heir at law and next of kin, and upon his death to give her such property as he had to dispose of. The effect of this was to enlarge the obligation of Thorne from that undertaken by him in the written agreement, and to give to the mother the right to reclaim her child on her arrival at the age of eighteen years, and before she had reached her majority. This, we think, cannot be sanctioned.

<sup>62</sup> In order to bring a case within the rule permitting parol evidence to complete a written agreement, it is essential that the writing must appear upon inspection to be an incomplete contract, and the parol evidence must be consistent with and not contradictory thereof. But when the written instrument upon its face appears to be complete, containing mutual obligations to be performed by the parties, parol evidence is inadmissible to vary its provisions. This we deem to be the settled rule of this court as to the question involved in this case. This was the effect of our decision in the case of *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961, in which the cases upon the subject were very fully collected and discussed. Since then the rule has been repeated and adhered to in *House v. Walch*, 144 N. Y. 418, 39 N. E. 327; *Case v. Phoenix Bridge Co.*, 134 N. Y. 78, 31 N. E. 254; *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298, 57 N. E. 480, and *Dady v. O'Rourke*, 172 N. Y. 447, 65 N. E. 273.

We consequently conclude that the testimony given by the mother of the plaintiff tending to enlarge and vary the contract was improperly received in evidence, and that the judg-

ment should be reversed and a new trial ordered, with costs to abide the final award of costs.

**Judge Bartlett dissented.** In his dissenting opinion, he referred at considerable length to the facts attending and preceding the adoption and to the terms of the agreement evidencing it. He next alluded to the findings of the trial court, and that they had been unanimously affirmed by the appellate division, and that thus the terms of the agreement had been fixed for the purposes of the appeal. He referred to the familiar rule of law pointed out in the prevailing opinion that, when a written agreement is obviously inconsistent and parol evidence is offered consistent with, and not contradictory of, it, such evidence is admissible; and claimed that, in order to determine whether parol evidence was competent to help out a written agreement which was claimed on the one side to embody the entire contract, and on the other to be a portion only of it, it was always necessary to examine the surrounding circumstances at the time of its execution. He said it appeared that the obvious reason for the execution of the crude indenture was to secure the consent of the commissioners of charities and corrections, under whose care the child and its mother then were. After further referring to the circumstances following the adoption, and extending to the death of the adopting father, the judge stated his final conclusions as follows:

“It will thus be seen that the issues in this case are narrowed down to a contest between the adopted daughter of the Thornes and this appellant, as the will of Joseph Thorne is carried out in every other respect.

“The appellant stands before the court as having obtained this property without consideration by fraud and undue influence with the intention of defeating plaintiff of her rights under an agreement which had been fully recognized by Joseph Thorne for a period of thirty years.

“I am free to admit that in a contest between a plaintiff, in every way worthy, and a defendant, who stands thus convicted by findings that are not to be disturbed on this appeal, if the well-settled rules of law render it impossible for the court to permit a recovery, the hardship of the situation ought not to bar a determination consistent with legal principles. It is because I believe the way is absolutely clear to do exact justice in this case that I am unable to agree with the decision that this court is about to make.

“In view of the present state of the law, it is no longer an open question as to the enforceability of an agreement like the one at bar.

“Much has been said as to the propriety of the courts decreeing specific performance of agreements resting in parol evidence concerning transactions that occurred many years before the trial. It is sufficient to say that each case must be determined on its

peculiar facts, and in that way justice will be done: *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; *Healy v. Healy*, 166 N. Y. 624, 60 N. E. 1112, 55 App. Div. 315, 66 N. Y. Supp. 927; affirmed in this court in opinion in *Winne v. Winne*, 166 N. Y. 363, 82 Am. St. Rep. 647, 59 N. E. 832. A motion for reargument was denied in *Healy v. Healy*, 167 N. Y. 572, 60 N. E. 1112.

"A number of other cases might be cited on this point, but I content myself with the latest utterances of the court.

"We have here involved no rights of those representing the testator's blood, and the case presents none of those features which have led judges and lawyers to question the propriety of enforcing agreements like the one now under consideration; but the sole bald issue is, in my judgment, whether this daughter of the Thornes' adoption shall recover property to which she is entitled in law and justice, or whether the appellant, with full knowledge of the existing agreement, and with fraud and undue influence, shall wrest it from her."

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*The Adoption by One Person of the Children* of another is the subject of a monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210-231. An oral contract of adoption, if fully performed by the parties, is valid: *Lynn v. Hackaday*, 162 Mo. 111, 85 Am. St. Rep. 480, 61 S. W. 885. And if the order directing a child to be henceforth considered as the child of another contains no statement as to the residence of the adopting parents, or as to whether the parties were examined separately or otherwise by the judge making the order, these facts may be proved by extrinsic parol evidence: *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

*Parol Evidence* is admissible to complete contract, if the contract appears incomplete upon its face, and no attempt to contradict the writing is made: See *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485; *Gould v. Boston Excelsior Co.*, 91 Me. 214, 64 Am. St. Rep. 221, 39 Atl. 554; *Jamestown Business College Assn. v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952; monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 661.



## LAHEY v. LAHEY.

[174 N. Y. 146, 66 N. E. 670.]

**INSURANCE in Beneficial Association—Change in Beneficiary Where the Certificate is Withheld by Him.**—Though the by-laws of a mutual benefit association provide that a member may change the beneficiary named in a certificate by surrendering it and filling up a blank on the back of the certificate provided for the designation of a beneficiary, and that the secretary shall forward the certificate and application to the grand lodge, and that the supreme recorder shall issue a new certificate in accordance with the change designated, yet if the assured does all which it is possible for him to do, and the surrender of the certificate is prevented by its detention by the original beneficiary, a change of beneficiaries is thereby effected to the extent that if the money is paid into court, it should be awarded to the new beneficiary, as against the old one, who, by his refusal to surrender the certificate after being requested so to do, prevented the issuing of a new certificate as desired by the member. (p. 563.)

Daniel V. Murphy and William L. Rumsey, for the appellant.

P. F. King, for the respondent.

**147** MARTIN, J. The Catholic Mutual Benefit Association is a domestic co-operative insurance company. Prior to the **148** 7th of February, 1884, William Lahey became a member of a branch of the association located at Niagara Falls, which issued to him a beneficiary certificate entitling him to participate in its beneficiary fund to the amount of two thousand dollars. The plaintiff, his wife, was designated as payee or beneficiary therein. During his life he or his wife complied with all the laws and regulations of the association, and at the time of his death, which occurred December 1, 1899, he was a member in good standing.

In June, 1898, the plaintiff separated from her husband and refused to live with him. When she left him she took with her the certificate of insurance, and retained it until the month of November, 1899. A considerable time after their separation, her husband became ill and went to live with his mother. He promised her if she would take care of him he would reimburse her by changing the policy for her benefit. She took care of him until the 12th of November, 1899. During that time he was afflicted with an illness which ultimately resulted in his death.

In September, 1899, the local lodge or association learning of his condition appointed a committee to look after him, sent

a doctor, and left money to procure such articles as were necessary during his illness. On the 30th of October he made and executed the following instrument: "I, William Lahey, hereby certify that I am a member in good standing of Branch 2, C. M. B. A., located at Niagara Falls; was initiated therein on the fourteenth day of November, 1877, that the beneficiary certificate heretofore issued to me by said Association, which was payable to my wife, and no (now) revoke my former payment and want it payable; one thousand dollars payable to my wife, Hannah Leahey; five hundred dollars payable to my mother, Margaret Leahey; five hundred dollars payable to Ignatz Reiss, Treas. of Branch 2, C. M. B. A., for to pay doctor and funeral expenses, and the balance that is left to be turned over to my mother, Margaret Leahey. Dated Niagara Falls this thirtieth day of October, 1899. William Leahey. Witness, John J. Daw, Recording Secretary Branch N. 2. (Branch Seal.)" <sup>149</sup> By this instrument he sought to change the beneficiary in said certificate, making his wife a beneficiary to the extent of one thousand dollars; his mother, five hundred dollars; and Ignatius Reiss, treasurer of Branch No. 2, in the sum of five hundred dollars to pay his doctor's bills and funeral expense, and any sum remaining to be turned over to his mother. This paper was attested by the recording secretary of that branch, its seal was affixed pursuant to the constitution and by-laws, it was delivered to Edward Ryan, the grand secretary, and by him delivered to, received by and filed in the office of Joseph Cameron, the supreme recorder, with a request that a new beneficiary certificate in compliance with such paper should be issued. The association failed and neglected to issue such certificate, delaying the same upon the ground that the original certificate should be surrendered with the application for the change.

William Lahey thereupon demanded the certificate of the plaintiff, who refused to surrender it, but withheld the same and prevented him from having or obtaining possession thereof, of which fact the secretary and supreme recorder had due notice, and, therefore, that he was unable to surrender it. The association thereupon notified him that it was powerless to issue a new certificate while the original was outstanding and not lost or destroyed; that the by-laws and constitution of the association provided no method by which a beneficiary in a certificate could be changed where the original certificate was wrongfully withheld by the original beneficiary, and on that account he was unable to procure the possession thereof. The application of October

30th was made and delivered for the purpose and with the intention of changing the beneficiary in the original certificate; the member did all he was able, under the circumstances, to effectuate that purpose, and such new designation remained and was in full force and effect at the death of said Lahey.

On the 12th of November the plaintiff, against the protest of the defendant, induced her husband to go with her to her home in the city of Buffalo, where he remained until his death. On the 27th of November, 1899, he made <sup>150</sup> an affidavit prepared by the plaintiff's attorney, in which he denied that he made or intended to make any change of his beneficiary, and stated that his mind for some weeks was defective. He also stated to certain persons while staying with the plaintiff that he had not changed the beneficiary in said certificate and wanted his wife to have the benefit thereof. After his death, due proofs were furnished the association. The plaintiff claimed the whole of the fund by virtue of the original certificate issued to her husband, and the defendant Margaret Lahey made claim for her interest in said fund and for the interest of Ignatius Reiss under such second designation. The plaintiff then brought this action against the association to recover two thousand dollars on the certificate, and in March, 1900, the association obtained an order of interpleader, paid one thousand dollars to the plaintiff, and paid the remaining one thousand dollars into court to await the result of this action between the plaintiff and the defendant Margaret Lahey. The foregoing is a brief synopsis of the facts as found by the trial judge.

Upon these facts the court, as conclusions of law, held that William Lahey changed the beneficiaries in said insurance as provided in the instrument of October 30th, so that one thousand dollars thereof was payable to the plaintiff, five hundred dollars to Margaret Lahey, and five hundred dollars to Ignatius Reiss to pay expenses, and the balance to be turned over to his mother; that he did all the acts which were necessary under the law to effectuate such purpose, and that the defendant was entitled to a judgment providing that five hundred dollars should be paid to her, and five hundred dollars to Reiss to be disposed of in the manner stated. This judgment was unanimously affirmed by the appellate division.

The insurance law relating to fraternal beneficiary societies, orders or associations provides: "Membership in any such society, order or association shall give to the member the right at any time, upon the consent of such society, order or associa-

tion, in the manner and form prescribed by its by-laws, <sup>151</sup> to make a change in its payee or payees, beneficiary or beneficiaries, without requiring the consent of such payees or beneficiaries": Laws 1892, c. 690, sec. 238. The by-laws of the Catholic Mutual Benefit Association, in force from 1887 to October, 1900, provide: "A member may at any time change, alter or amend the designation of person or persons to whom the beneficiary named in his certificate is payable, by surrendering said certificate, after having filled or caused to be filled, the blank which shall be provided for that purpose on the back of the same, providing for a new designation, and attach his signature to it. The secretary of his branch shall attach his signature to it as witness, and the seal of his branch, and forward it to the grand secretary, if in his immediate jurisdiction. Upon the receipt of the same by the supreme recorder, he shall issue a new certificate in accordance with such change of designation." "A member whose certificate has been lost or destroyed may have a new certificate issued to him by filing an affidavit with the supreme recorder that the beneficiary certificate heretofore issued to him has been lost or destroyed, and that he applies for a duplicate of the same; the price to be charged for such new certificate to be fixed by the supreme trustees."

The proof disclosed that there was in the constitution or by-laws of the association nothing relating to the issuing of a certificate where it had been withheld, and that there was no other provisions relating to the subject of changing designations on certificates lost or withheld. The officers of the association refused to make the change requested, upon the ground that before such change could be made the certificate must be surrendered, and they refused to issue a new certificate for the reason that there was no provision, either by statute or by-law, by which they are authorized to do so unless the original certificate was lost or destroyed. The dues of the assured were paid by the plaintiff for the last nine or ten years of Lahey's life. Indeed, there is proof tending to show that he, as well as his mother and other members of his family, was surprised when they found that the insurance had <sup>152</sup> been kept alive by payments made by her. In determining the rights of the parties in this case, the statute, the constitution and by-laws of the association, with the policy or certificate, taken together, constitute the contract between them and the standard by which their rights and liabilities are to be determined: Matter of



Equitable Relief etc. Assn., 131 N. Y. 354, 369, 30 N. E. 114; People v. Life etc. Assn., 150 N. Y. 94, 108, 45 N. E. 8.

This court has recently held that a member of such an association, who has the absolute power to change the beneficiary designated in his certificate by complying with a by-law which is exclusive upon the subject, and provides that a new certificate shall be issued if a member asks for one, but upon condition that he pay the sum of twenty-five cents, can appoint another beneficiary only by a strict compliance with such by-law. In that case Judge Vann said: "The change of the beneficiary is an important matter, for it transfers the right to receive the death benefit, amounting in this case to one thousand dollars, from one person to another. The right of the member to make the change is absolute, and the beneficiary can neither prevent it by objecting, nor promote it by consenting. Obviously such a transaction requires some formalities for the protection of the company, the member and the beneficiary. The formalities required by the association before us, through its by-laws, were very simple, but unless they were substantially complied with, the change could not be made. Mere intention to make a change is not enough, for the acts prescribed to carry the intention into effect are forms imposed upon the execution of a power, and they must be observed or the change cannot be effected": Fink v. Fink, 171 N. Y. 616, 622, 64 N. E. 506, 507. In that case the certificate holder died before a request for a change reached the company, it having been sent by mail, and the court held that there was no change in the beneficiary.

In Lührs v. Lührs, 123 N. Y. 367, 20 Am. St. Rep. 754, 25 N. E. 388, where a similar question arose, the facts were essentially different from the case at bar, as in that case the certificate was surrendered, <sup>153</sup> with directions that a new certificate should be issued to the substituted beneficiary. It was mailed to the lodge, but the certificate holder died before the change was made or the certificate reached the home office. In that case it was held that the old certificate was to be regarded as canceled when surrendered to the lodge, and that the death of the member did not operate to prevent the consummation of the surrender or the issuing of a new certificate. In this case, however, there was never any surrender of the certificate, so that if it is to be determined strictly according to the provisions of the contract between the parties, there never was any legal change of beneficiary. Therefore, the plaintiff was entitled to recover the full amount of the certificate unless the respondent

can sustain her rights upon some other or different ground. She, however, contends that the right to change the beneficiary in a certificate, like every other valuable right, may be sold or transferred, and when transferred for a valuable consideration the insured loses the right to transfer it to others: Citing *Webster v. Welch*, 57 App. Div. 561, 68 N. Y. Supp. 55; *Smith v. National Benefit Soc.* 123 N. Y. 87, 25 N. E. 197; *Conselyea v. Supreme Council*, 3 App. Div. 464, 38 N. Y. Supp. 248; affirmed, without opinion, 157 N. Y. 719, 53 N. E. 1124. In those cases it was held that the statute which gives to a member the right to make a change in the beneficiary without the consent of the latter applies only when the original designation is in the nature of an inchoate or an unexecuted gift, and does not prevent a contract between the member and his beneficiary by which a vested right passes to the latter, and in such case, without his consent, the beneficiary may not be changed.

The cases cited are clearly distinguishable from the case at bar in that in the former the beneficiary became such for a valuable consideration and the association issued a certificate to such beneficiary, while in this case, although the court has found that the mother paid a valuable consideration for a transfer of the certificate or a portion of its benefits, still no certificate was ever issued to her, nor was the certificate which was issued and made payable to the plaintiff ever canceled, so that she ceased to be a beneficiary under it. Besides, the <sup>154</sup> assured before his death made an affidavit to the effect that he was a member of the association; that his wife was designated as the beneficiary in the original certificate; that he had never to his knowledge made a request for any change of beneficiary, and never knowingly signed any application for such change; that members of the association and some of his relatives tried to persuade him to change, but that he always declined to do so, and that it was his desire that the policy should stand and be payable to his wife. There was also proof that he repeatedly declared he had no desire to change the beneficiary, but was desirous that his wife should have the benefit under his certificate.

Although under the proof in the record the trial court might very well have found in favor of the plaintiff, yet it having found for the defendant and its decision having been unanimously affirmed by the appellate division, we are concluded as to the facts or the sufficiency of the evidence, and have no jurisdiction to review the question whether the decision of the

court below was sustained by the weight of evidence, or whether there was any evidence whatever to sustain it. Thus the question arises whether, under the facts as found, the court was authorized to change the beneficiary or to award to the defendant a portion of the fund in the hands of the court. In other words, assuming as we must that the plaintiff withheld the certificate after the assured had requested its surrender, did that enable him to change his beneficiary without its surrender and to effect an actual change in a manner not provided for by the by-laws of the association? If the question had arisen between the defendant and the association, it is quite possible that she could not have recovered. But that is not this case. Here the question of the liability of the association to the defendant is not involved. It has discharged its liability upon the certificate by payment into court, so that the question involved in this case arises between two alleged beneficiaries, and the point presented is whether the nonsurrender of the certificate was a bar and prevented the defendant from recovering in equity, in view of the fact that <sup>155</sup> the plaintiff refused to surrender the certificate upon her husband's demand and thus prevented a change in the manner required by the by-laws of the association.

As this precise question may not have been settled by any previous decision of this court, in proceeding with the discussion it is deemed proper to here consider some of the authorities bearing upon this phase of the case. In *Supreme Conclave, Royal Adelpia v. Cappella*, 41 Fed. 1, it was held that the general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association, is subject to three exceptions: 1. If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; 2. That if it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made; 3. If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will treat such certificate as having been issued. The doctrine of that case was followed in *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865,

and the same exceptions are stated in 2 May on Insurance, section 399-O.

In *Marsh v. American Legion of Honor*, 149 Mass. 512, 21 N. E. 1070, where a member of a beneficiary association took all the necessary steps, so far as he was able, to designate his mother as his beneficiary, instead of his wife, and the association was ready to make the change, but in consequence of his wife's acting in collusion with a subordinate officer of the association, the change of designation was not formally effected before his death, it was held that the mother was entitled to the fund.

In *Wilson v. Bryce*, 43 App. Div. 491, 494, 60 N. Y. Supp. 132, 133, Hatch, J., in discussing this question, said: "If it had appeared that the certificate <sup>156</sup> was lost, or that the insured was unable to obtain possession of it, or that its possession was forcibly or fraudulently withheld from him, and he had made his application to the legion for the issuance of a new certificate or a change of beneficiaries, then we would have a case similar to that of *Grand Lodge v. Child*, 70 Mich. 163, 38 N. W. 1, and under such or similar conditions equity might lay hold of the case and direct judgment in accordance with the equities of the parties."

In the *Child* case it was held that the law never requires impossibilities, and the rule of a benefit association which requires a certificate of insurance to be surrendered upon change of beneficiary, to the end that it might be indorsed upon such certificate, can only be construed as so requiring it when the certificate is in existence and can be thus surrendered.

In *Isgrigg v. Schooley*, 125 Ind. 95, 25 N. E. 151, S. was the holder of a beneficiary certificate in a mutual benefit society. The by-laws of the order provided that when a member desired to change the beneficiary named in the certificate, he must, among other things, surrender the old certificate. The beneficiary originally named had been the wife of the deceased. She abandoned him, however, and refused to live with him, and without his consent took the certificate away with her. Upon a demand for its return, she stated that it was lost. The deceased being desirous of changing the beneficiary, complied with all the requirements of the by-laws in respect thereto, save the surrender of the old certificate, assigning its alleged loss for his failure to do so. It was charged that the officers of the subordinate lodge conspired with the wife to prevent the change, and



refused to certify said application, and no new certificate was issued. In that case it was held that the acts of the decedent constituted an equitable change of beneficiary, and that the person in whose favor the decedent desired a new certificate to issue was entitled to the fund; that the beneficiary in such a certificate of insurance does not, during the life of the member, have an indefeasible right in the contract or fund, but has an interest which can only be <sup>157</sup> defeated by a change effected in the manner provided by the by-laws, but that there are exceptions to this general doctrine, and that equity will aid imperfect changes of beneficiaries, and consider that done which ought to have been done, as it never requires impossibilities. The same principle is stated in *Kepler v. Supreme Lodge, Knights of Honor*, 45 Hun. 274, 278. See, also, *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657.

In *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458, an unmarried man took out a policy of insurance on his life, one condition of which was that the policy was issued and accepted upon the express condition that the assured might, with the consent of the company, at any time assign it, or, before assignment, change the beneficiaries, or make any other change. The person named as the beneficiary was the sister of the assured, and to her he delivered the policy, and paid the premiums to that time. Subsequently he married, and, as an inducement thereto, he agreed that if the woman would marry him, she should be made the beneficiary of the policy. After the marriage, and when the next semi-annual premium fell due, the assured paid it, on condition that the beneficiary should be changed from his sister to his wife. The sister had the policy and would not give it up. The agent was uncertain whether the change could be made without the policy, but promised to notify the company and have the change made if possible. The officers agreed to attend to the matter but overlooked it. After the death of the assured, the company filed a bill to require the wife and sister to interplead and have the question determined as to who was entitled to the money. It was held that the gift to the sister was not perfected, so as to be absolute and irrevocable, and the assured had the right to change the beneficiary of the policy, and whether such change was to be effected by parol or in writing was a matter entirely between the assured and the company.

In *Wilcox v. Equitable Life Assur. Soc.*, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857, where a policy of life insur-

ance contained a clause that if, after the payment of the premiums for three years, the policy should become void in consequence of a default in the <sup>158</sup> payment of subsequent premiums, the company would issue, in lieu of such policy, a new paid-up policy for a certain proportion of the original amount assured, "provided that the said policy shall be surrendered duly receipted within six months of the date of default in payment of premium on said policy," it was held that the insured, who defaulted in the payment of premiums after seven annual premiums had been paid, and from whom the policy had been stolen, might maintain an equitable action for a decree directing the company to issue a new paid-up policy upon proof that the policy was stolen without his fault.

We are of the opinion that the principle of these cases should be followed; that under the findings of fact which are conclusive upon us it should be held that the plaintiff wrongfully retained the certificate from the possession of her husband, and that by reason thereof a proper transfer was prevented; that she should not be permitted to profit by her own wrong, but that although the attempted change of beneficiary was imperfect, equity should aid the defendant and consider that as done which ought to have been done.

It follows that the judgment appealed from should be affirmed, with costs.

Parker, C. J., Bartlett, Cullen and Werner, JJ., concur.

Gray, J., absent.

O'Brien, J., not voting.

Judgment affirmed.

*Analogous to the principal case* is the decision in *Wilcox v. Equitable Life Assur. Soc.*, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857 where it is held that a demand for a new paid-up policy by an assured will not be denied in equity, because his policy has been stolen, and he is unable to surrender it as conditioned for, when he has used due diligence to reclaim it, and is still the owner. And so is the case of *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458. There, an unmarried man insured his life for the benefit of his sister, and delivered the policy to her. The policy was conditioned that he might change the beneficiary with the consent of the company. Subsequently, he married, agreeing that if the woman would marry him, she should be made the beneficiary. He paid the next premium on condition that the change should be made. But his sister would not give up the policy, and the change was not made. The insured having died, and the company having brought the sister and widow to interplead, the latter was held entitled to the fund.

## TAYLOR v. COMMERCIAL BANK.

[174 N. Y. 181, 66 N. E. 726.]

**REPRESENTATIONS as to a Fact to Occur in the Future.**—A statement that a party will get his pay if he makes a loan to a third person, is not a statement of an existing fact, but, at most, of something in the future, and hence not actionable, though it turns out to be untrue, unless the statement was made with knowledge of its falseness, and was not a mere expression of opinion. (p. 565.)

**BANKING.**—A Bank Cashier is not Acting Within the Scope of His Employment in making a representation respecting the solvency of a customer in response to an inquiry addressed to him by one considering the desirability of making a loan to such customer. (p. 566.)

**BANKING**—Cashier, Authority of, When a Question of Law.—Whether a particular act falls within the general power of a cashier is a question of law for the court and not for the jury, although a question of fact may arise when it is claimed that the acts or conduct of the board of trustees has amounted to a public holding out of the cashier as its agent to perform other and unusual acts for the bank. (p. 568.)

**PRINCIPAL AND AGENT.**—A Principal is not Answerable for the Unauthorized Fraud or Misrepresentation of his agent, on the ground that the principal might have profited by the wrongful and unauthorized act, where there is no evidence that he either adopted or profited by it. (p. 570.)

**EVIDENCE.**—The Admissions of an Agent are not Competent as Evidence against his principal, unless they are expressly authorized, or relate to, and are connected with, some act done in the course of his agency. (p. 571.)

**EVIDENCE.**—The Admissions or Declarations of an Agent are not evidence against his principal to establish the fact of his agency or the extent of his authority. (p. 571.)

Walter S. Hubbell, for the appellant.

Charles J. Bissell, for the respondent.

**183 MARTIN, J.** The defendant is a domestic corporation organized under the laws of this state, and the purpose of this action was to recover damages alleged to have been sustained by the plaintiff on account of false and fraudulent representations by which he was induced to sell goods on credit to one Lighthouse, who was financially irresponsible.

Upon the trial, at the close of the evidence, a motion for a nonsuit was made by the defendant upon the grounds that the representations made were not the representations of the bank; that the bank received nothing from the transaction, and, consequently, it was not liable for any representations made by its

cashier. This motion was granted. The plaintiff appealed to the appellate division where, by a divided court, the judgment was reversed and a new trial granted.

The only question involved is whether there was evidence to justify the submission to the jury of the question of the defendant's liability. At the time of the alleged representations Lighthouse was engaged in the manufacture of mail bags under a contract with the United States government. He was and for several years had been a customer of the defendant, and was then its debtor to the amount of about <sup>184</sup> fifteen thousand dollars secured by notes made by him and indorsed by John L. Acker. Lighthouse had been recently burned out, and the jury would have been justified in finding that he was practically insolvent, although his business had been very profitable, netting him annually from six to ten thousand dollars. As appears from a statement in the possession of the defendant's cashier, Acker was the owner of real estate to the value of about thirty-one thousand seven hundred dollars, which was encumbered for seventeen thousand four hundred and fifty dollars, leaving an equity of about fourteen thousand two hundred and fifty dollars, and was an indorser upon the paper of Lighthouse to the amount of about fifteen thousand dollars. All of these facts were known to the cashier of the defendant. Lighthouse applied to the plaintiff to purchase a quantity of merchandise of the value of about five thousand dollars, in payment for which he proposed to give a note made by himself and indorsed by Acker, and referred the plaintiff to the defendant for information as to their responsibility. The plaintiff subsequently called at the office of the defendant, saw its cashier, stated that he had been referred to him to ascertain the responsibility of Lighthouse and Acker, and the cashier thereupon told him that the contract which Lighthouse had with the government was all right, to take the note, it would be good and he would get his pay. The plaintiff testified that upon these representations he sold the merchandise and took in payment therefor a note made by Lighthouse and indorsed by Acker. There is no pretense that the statement as to the contract which Lighthouse had with the government was untrue, and the statement that he would get his pay was not a statement of an existing fact, but at most of something in the future, and, hence, not actionable: *Lexow v. Julian*, 21 Hun. 577; affirmed, 86 N. Y. 638; *Gallagher v. Brunel*, 6 Cow. 347; *Farrington v. Bullard*, 40 Barb. 512, 516; *Treacy v. Hecker*, 51 How. Pr. 69, 70; *Sawyer v. Prickett*, 19



Wall. 146, 163. Therefore, the only ground upon which a recovery could be had, even against the cashier, is that the statement that the note would be good was material; that it was made with a knowledge of its falsity and with intent that <sup>185</sup> it should be acted upon, and was not a mere expression of opinion. In other words, the plaintiff was bound to prove as to this statement, representation, falsity, scienter, deception and resultant injury to the plaintiff: *Arthur v. Griswold*, 55 N. Y. 400; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376.

If we assume, which we do not decide, that the representations were sufficient to render the cashier personally liable, still the serious question in this case is whether the bank is liable for the statements made by its cashier. Obviously, when the representations were made, the cashier was not engaged in the transaction of the business of the bank. It is equally clear, as we shall see later, that it is no part of the duty of a bank cashier to make representations as to the responsibility of its customers or others. In this case *Lighthouse* referred the plaintiff to the bank to inquire as to his responsibility. The plaintiff called upon the cashier, made the inquiry, and was told by him the business in which *Lighthouse* was engaged; that he had a contract with the government which was all right and had been renewed; that the note would be good, and he would get his pay.

The duties of a cashier are strictly executive. He is properly the executive agent of the board of directors, as such to carry out what it devises as to the management of the business of the bank. There are certain functions which, by long and universal usage, have come to be recognized as belonging to the office of cashier. They are declared to be inherent in the office or position as a matter of law, and, unless restricted or enlarged, they and they only, can be performed by him by virtue of his appointment. Under the circumstances of this case it is plain that it could not be properly held that the defendant's cashier was acting within the scope of his employment in making the representations complained of: *Crawford v. Boston Store etc. Co.*, 67 Mo. App. 39; *Horrigan v. First Nat. Bank*, 56 Tenn. (9 Baxt.) 137; *First Nat. Bank v. Marshall & Ilsley Bank*, 83 Fed. 725; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Mapes v. Second Nat. Bank*, 80 Pa. St. 163.

<sup>186</sup> In the *Crawford* case it was held that a cashier has no apparent or implied authority by virtue of the position he holds

to make any representation on behalf of the bank as to the solvency of one of its debtors, and, therefore, that the bank will not, in the absence of evidence of authorization, be bound or estopped by such representation made by him in reply to an inquiry on the subject.

In the *Horrigan* case it is held that answering questions as to the solvency of parties is no part of the business of a cashier of a bank, nor fairly included within the scope of such business, but may be, and probably is, an incident of such position, but not an incident to it, and in such case no liability attaches to the bank.

In *First Nat. Bank v. Marshall & Ilsley Bank*, 83 Fed. 725, it was held that the cashier of a bank does not act as its agent or representative in answering an inquiry addressed to him by another bank as to the business standing of a third person; and the bank is not bound or estopped by statements so made by him, his act being one not relating to the business of the bank, but simply one of customary courtesy, rendered without consideration, and that the failure of the officers of the bank, in answering a general inquiry from another bank as to the character and standing of a customer, to disclose the fact that the customer was indebted to their bank and that it held liens on certain of his property, will not estop it to assert such liens as against a mortgage subsequently taken by the inquiring bank.

In the *American Surety* case it was held that the making of a statement as to the honesty and fidelity of an employé of a bank for the benefit of the employé, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary business of a bank president.

In *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181, it was held that in the absence of proof that special authority had been delegated by its board of directors, or had been exercised with their sanction or knowledge, or evidence that it had been the habit and practice of the corporation to receive property for <sup>187</sup> safekeeping, it was not responsible for property so received by its cashier.

In the *Mapes* case, a suit by the bank against indorsers of a note discounted for the accommodation of the drawer, where the affidavit of defense was that at and before the time that defendants indorsed the note they had inquired of the cashier and one of the directors of the bank whether it would be safe for them to indorse, and that these officers informed them that they considered the drawer perfectly good, and they would be safe

in indorsing, that the officers knew the representations to be false, and that they made them to deceive the defendants, who would not have indorsed but for the representations, it was held to be insufficient, and that such declarations, although willfully false, made by the officers, not in the course of their duties as officers or agents of the bank, could not affect the bank.

Whether any particular act does or does not fall within the general power of a cashier is said to be a question of law for the court and not of fact for the jury, although a question of fact may arise when it is claimed that the acts or conduct of the board of directors have amounted to a public holding out of the cashier as its agent to perform other and unusual acts for the bank: *Farmers' etc. Bank v. Troy City Bank*, 1 Doug. (Mich.) 457; *Peninsular Bank v. Hanmer*, 14 Mich. 208; *Merchants' Bank v. State Bank*, 10 Wall. 604; 1 Morse on Banks and Banking, 4th ed., sec. 153, note; Huffcut on Agency, 156. It is true a bank may, by the adoption of a method of transacting its business which includes other than the ordinary powers vested in a cashier, confer upon him such additional powers as are necessary for the transaction of the business in the manner thus adopted.

There was no evidence in this case which would have justified a finding that the defendant's cashier had any authority to perform any duties other than those which inhered in the office. Nor was there any evidence whatsoever that any unusual method had been adopted by the bank for the transaction of its business, which would include any authority<sup>188</sup> upon the part of the cashier to bind the bank by representations as to the responsibility of its customers.

In September, 1894, more than a year after the representations are alleged to have been made, Lighthouse's business having proved unsuccessful by reason of the lack of orders from the government, he transferred his property and business to Thomas Swanton and John L. Acker under an arrangement by which the business was to be conducted by them in a manner specified. All deposits were to be made in the defendant bank, and the profits of the business and proceeds of the property were to be applied to pay the bank and the debt of the plaintiff, and, as testified to by the plaintiff's son, they were to share pro rata. When these obligations were discharged the business was to be restored to Lighthouse or to any person designated by him, after compensation to Swanton and Acker for the services rendered by them.

Swanton was teller of the bank and Acker was indorser upon the notes held by the plaintiff and the bank. The business conducted by them was not successful. No profits were realized, chiefly because orders from the government ceased, and the business and property when ultimately disposed of realized nothing to apply upon the indebtedness of either the bank or of the plaintiff, so that the bank received nothing which rendered it liable for the means by which it was obtained or estopped it from denying the cashier's authority.

The respondent contends that the defendant was liable for the fraud of its cashier upon the principle that where a party receives and retains the fruits or product of a fraud it imposes a liability therefor, although such person may be innocent of personal participation in the wrong. It is an established principle of law that where a person acts for another who accepts the fruits of his efforts, the latter must be deemed to have adopted the methods employed, as he may not, even though innocent receive the benefits and at the same time disclaim responsibility for the fraud by means of which they arose: *Garner v. Mangam*, 93 N. Y. 642; *Krumm v. Beach*, 96 N. Y. 398; *Fairchild v. McMahon*, 139 N. Y. 290, 36 Am. St. Rep. 101, 34 N. E. 779. Obviously, that <sup>189</sup> principle has no application to the case at bar, as it is practically undisputed that the bank received nothing from the property of Lighthouse. Nor did it receive any advantage by reason of the sale to Lighthouse of the goods in question.

It is further urged that the liability of a principal for the unauthorized fraud of another includes a case where, although the principal did not profit, he might possibly have profited by the wrongful and unauthorized act. We have found no authority sustaining any such doctrine. A remark of Lord Coleridge in *Swift v. Jewsbury*, L. R. 9 Q. B. 301, 312, seems to be relied upon. In that case the decision of *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, was under consideration, and it was there said: "I apprehend that there can be no doubt that a different set of principles altogether arises where an agent of a joint stock company in conducting the business of a joint stock company does something of which the joint stock company take advantage, and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent one. Justice points out, and authority supports justice in maintain-



ing, that where a corporation takes advantage of the fraud of their agent they cannot afterward repudiate the agency and say that the act which has been done by the agent is not an act for which they are liable." We find in this case and in the other cases relied upon by the respondent no decision or enunciated principle which supports his contention. But, on the contrary, we find that the cases cited merely sustain the conceded principle that one who receives and retains the fruits of fraud becomes liable therefor. The language of Lord Coleridge is to be considered in the light of the case he had under consideration, and the words "by which they profit, or by which they may profit," are to be interpreted in view of the questions involved and of their context. Obviously, they were employed, upon the assumption that advantage had been taken of the transaction, induced by the fraud of the agent. In that case, the agent acted within the scope of his general authority in writing the letter which was the fraud <sup>190</sup> complained of. Moreover, the words "by which they profit, or by which they may profit," refer only to a condition where the principal has actually taken advantage of the unauthorized act of the agent. If the principle contended for by the plaintiff were broadly sustained, why would it not apply to him as well as to the defendant, the arrangement having been that the benefits of a continuance of the Lighthouse business were to be shared pro rata by the plaintiff and defendant. This suggestion illustrates the fallacy of the claim that a party who might profit by a fraudulent transaction would be liable therefor, although he neither adopted it nor took any advantage under it. Moreover, the decision in the Swift case rested entirely upon another ground which includes no principle applicable to the case at bar.

It was said by the learned judge delivering the opinion of the court below that the evidence was sufficient to support a finding by the jury that when the cashier made such representations he was acting for or on behalf of the bank and made them for the purpose of enabling Lighthouse to obtain the plaintiff's property, to the end that Lighthouse might thereby continue in business and realize therefrom sufficient to enable him to discharge his obligations to the bank, or some part thereof. We regard this claim at most as merely conjectural and, under the evidence, as too nebulous to form the basis of a judicial determination. If there is any competent evidence in the record sufficient to have justified a jury in

finding that the cashier was acting for or on behalf of the defendant in making such representations, or that they were made for the purpose stated, we have been unable to discover it. While there was proof of declarations and admissions of the defendant's cashier and teller as to past transactions and as to matters not relating to any business of the bank and which, consequently, did not bind it, there was no competent proof of any facts which would have supported a finding of the jury to that effect. The admissions of an agent are not competent evidence against his principal unless they are expressly authorized or relate to and are made in connection <sup>191</sup> with some act done in the course of his agency so as to form a part of the *res gestae*: *Anderson v. Rome etc. R. R. Co.*, 54 N. Y. 334; *Manhattan Life Ins. Co. v. Forty-Second St. etc. R. R. Co.*, 139 N. Y. 146, 34 N. E. 776.

Nor can the admissions or declarations of an agent be evidence against his principal, either to establish the fact of his agency or the nature or extent of his authority. Neither can he create authority in himself to do a particular act by its performance or by asserting his authority to do it: *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. Ct. App. Dec. 315; *Hatch v. Squires*, 11 Mich. 185; *Howe Machine Co. v. Clark*, 15 Kan. 492; *Brigham v. Peters*, 1 Gray (Mass.), 139; *Mitchum v. Dunlap*, 98 Mo. 418, 11 S. W. 989; *Butler v. Chicago etc. R. R. Co.*, 87 Iowa, 206, 54 N. W. 208; *Mechem on Agency*, sec. 100.

Even without eliminating from our consideration the incompetent testimony of the acts and declarations of the employes of the bank when not engaged in the transaction of the business of the latter, there is practically no evidence which would justify a jury in finding that the cashier was acting for or on behalf of the defendant in making the representations which are the subject of this action. It is true that when the cashier made such representations *Lighthouse* was indebted to the bank for more than fifteen thousand dollars, yet, as we have already seen, no duty was imposed upon the cashier, as such, to communicate to a person inquiring as to the responsibility of a customer, the actual situation of his account at the bank. Nor is it within the line of the duty of a cashier to disclose the condition of the account of the customers of a bank whenever inquiry is made as to their responsibility.

A careful study of the evidence discloses that there were no facts, circumstances or proof that would justify the conclusion

that the defendant's cashier was in any way engaged in the business of the bank in making any of the representations proved, or that his purpose in making them was that attributed to him by the court below. It is possible that, under the evidence, the court may have suspected that such was the purpose, but a mere conjecture, suspicion or surmise is not sufficient to <sup>192</sup> authorize a finding to that effect: *Laidlaw v. Sage*, 158 N. Y. 73, 94, 52 N. E. 679.

It follows that the trial court properly nonsuited the plaintiff, and hence the judgment of the appellate division must be reversed and that of the trial court affirmed, with costs.

**Judge Bartlett Dissented.** He said there was no difference in the opinions of the members of the court concerning the proposition that "if A, being a depositor in a bank, and desiring B to give him credit, sends him to the bank for information as to his financial responsibility, and the cashier represents A to be worthy of credit, the cashier must be deemed to have acted in his individual capacity, and his action would in no way bind the bank; that is to say, the relation of A to the bank, being solely that of depositor, would not justify the cashier in speaking officially." But the judge claimed that the facts of the case disclosed a very different relation between the bank and the depositor; that Lighthouse had been engaged for many years in the business of manufacturing mailbags under a contract with the government, and that, having solicited credit from the plaintiff, he caused him to apply to the bank's cashier for information; that at this time Lighthouse was indebted to the bank for a large sum, and had no financial responsibility, except such profits as he might realize by performing his contract with the government; that he was, during all the transactions involved, a depositor with the bank, and that honesty and fair dealing required the bank, when called upon by the plaintiff, to either refuse to make any statement in regard to the financial responsibility of Lighthouse, or to disclose the fact that it had been for a long time discounting his paper, and at that time held a large amount of it; that it was greatly to the interest of the bank that the credit of Lighthouse should be maintained, but that if the plaintiff had been advised of the true relation between the bank and Lighthouse, and of the condition of Lighthouse's business, no credit would have been extended to him. The judge then added:

"In writing this dissenting memorandum, we have spoken positively as to the effect of what we deem to be the controlling facts in this case, but the point really presented for our consideration is, Was there sufficient evidence to submit to the jury the question whether these facts showed that the cashier was acting for the bank when he made the representations upon which the plaintiff relied?

The learned appellate division was of the opinion that there were such facts and granted a new trial.

"A very instructive case, having a direct bearing upon the situation here presented, is *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259. In that case the cashier of the bank delivered a written guaranty to the plaintiff to the effect that J. D.'s check on the bank in plaintiff's favor, in payment of goods supplied, should be paid on receipt of the government money, in priority to any other payment, except to the bank, and made false statements as to the credit of J. D. It appears that J. D. was indebted to the bank at the time in the amount of twelve thousand pounds; that this fact was not disclosed to the plaintiff, who, relying upon the representations, extended credit to J. D., and accepted his check on the bank, which the latter refused to honor, but applied the government money upon the indebtedness due it from J. D. The plaintiff sued the bank for fraudulent representations and it was held liable.

"In *Swift v. Jewsbury*, L. R. 9 Q. B. 301, Chief Justice Coleridge (at page 312) comments favorably upon the *Barwick* case.

"The case of *American Nat. Bank of Denver v. Hammond*, 25 Colo. 367, 55 Pac. 1090, is also very much in point.

"We are of opinion that the judgment of the appellate division should be affirmed."

Judges O'Brien and Vann concurred in the dissenting opinion.

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*The Cashier of a Bank* is only its agent, and his conduct is governed by the ordinary rules of agency. Hence the bank is bound so long as he keeps within the scope of his authority, but is not answerable if he acts beyond his authority or in his individual capacity: See *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438, and cases cited in the cross-reference note thereto: *Havens v. Bank of Tarboro*, 132 N. C. 214, post, p. 627, 43 S. E. 639.

*The Declarations of an Agent* are evidence against his principal if made while executing an authority conferred upon him, and relating to his business, and within the scope of his authority: *Carney v. Hennessey*, 74 Conn. 107, 92 Am. St. Rep. 199, 49 Atl. 910. But the powers of an agent cannot be enlarged by his unauthorized representations: *Spelman v. Gold Coin Min. etc. Co.*, 26 Mont. 76, 91 Am. St. Rep. 402, 66 Pac. 597. And the declarations of one assuming to act as an agent are not admissible to prove his agency: *Paulton v. Keith*, 23 R. I. 164, 91 Am. St. Rep. 624, 49 Atl. 635; *Lowall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662, and cases cited in the cross-reference note thereto.



## ZELTNER v. ZELTNER BREWING COMPANY.

[174 N. Y. 247, 66 N. E. 810.]

**CORPORATION—Resignation of Officers of, for the Purpose of Causing the Appointment of a Receiver.**—Though the code provides that a receiver of the property of a corporation may be appointed in an action “brought by the attorney general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same,” resignations made for the purpose of enabling such an action to be brought, and a receiver to be appointed, are ineffective. (p. 577.)

Henry A. Forster and Frederick P. Forster, for the appellant.

Louis Marshall, Moses Weinman and Abraham Benedict, for the respondents.

249 WERNER, J. This is a contest for priority between a judgment creditor and the receiver of the defendant corporation. The question at issue is whether the appellate division properly modified the order appointing the receiver herein, so as to permit the defendant Yorkville Bank to prosecute to judgment and collection its claim against the corporation. At special term the court denied the bank’s motion to vacate or modify the order appointing the receiver, and at the appellate division this decision was reversed and the original order modified as stated. The proceeding comes to this court upon three questions certified by the appellate division, but as our answer to the first one will dispose of the only issue before us, we shall not deal with the others. The first certified question alluded to is as follows: “Were the resignations of the officers and directors (excepting the secretary) of the Henry Zeltner Brewing Company, for the purpose of enabling this action to be brought, and a receiver of the property of the corporation to be appointed, legal or effective?” No intelligent answer to this question can be made without reference to the history behind the resignations therein mentioned.

The defendant corporation was organized in 1892. Its business was the manufacture and sale of beer and other malt beverages. Its capital stock was three hundred thousand dollars divided into three thousand <sup>250</sup> shares of one hundred dollars each. The plaintiff was the holder, in his own right, of five hundred shares, and the holder of two thousand four hundred and eighty-three shares as executor under his father’s will. Other members of the Zeltner family held fifteen shares, and

the remaining two shares stood in the names of employés. Prior to 1900 the business of the corporation had been profitable, but in that year it began to decline and thus continued until February, 1902, when the corporation owed three hundred and twenty-two thousand five hundred dollars, upon mortgages and taxes and one hundred and ninety-seven thousand dollars to unsecured creditors. Some of these debts had matured and were being pressed in amounts far in excess of the ready assets of the corporation. Actions had been commenced and others were threatened. These were the conditions, on February 1, 1902, when all of the officers of the corporation, except the secretary, and all of the directors resigned their offices. Straightway this action was instituted upon a complaint in which the allegations of insolvency of the corporation are alternated by statements showing that if its affairs should be carefully administered under the direction of the court, enough might be realized to pay its creditors and stockholders in full, and which frankly declares that the officers and directors of the corporation deemed it their duty to resign so that the beneficent aid of the court could be invoked. Thereupon a receiver of the corporation was appointed under the provisions of section 1810 of the Code of Civil Procedure, which, so far as material here, reads as follows: "A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases. . . . Subd. 3. An action brought by the attorney general, or by a stockholder to preserve the assets of a corporation, having no officer empowered to hold the same."

The order appointing the receiver clearly shows that his duties and powers were not limited to the mere preservation of the corporate assets, but he was invested with all the ample powers usually conferred upon receivers in proceedings to dissolve corporations and wind up their business, and this with such good effect that at last accounts he was doing a very profitable business.

<sup>251</sup> Subdivision 3 of section 1810, above quoted, seems to have no history anterior to 1870, when it was imported into the code by chapter 151 of the laws of that year. In view of this lack of antecedents it is impossible to say much more of this subdivision than that it means just what it says. It was evidently intended to provide for the exigencies which must arise when a corporation is without officers to conduct its business or preserve its assets. Such a condition might grow out of one or more of any number of supposable causes

which it will not be profitable to specify here. It is enough to say that, while the language of the subdivision is broad enough to cover every case in which a corporation is without officers, we do not think it was ever designed to permit the latter to abandon their posts of duty and abdicate their official functions for the express purpose of shifting their burdens to the shoulders of the courts. Officers of corporations are charged with certain duties, and among them is the primary duty of preserving their assets. To say that the legislature intended that such an obvious duty can be disregarded for the express purpose of inviting judicial interference in the conduct of corporate affairs, would be to impute to the law-making power a lack of both intelligence and morality, for such action would, in many instances, amount to a fraud upon the courts, upon stockholders, creditors and the general public. If the authority for the resignations under discussion is not created by the subdivision of the statute above quoted, it will be manifestly impossible to justify the action of the officers of the defendant corporation upon any other ground than that of their inherent right to resign.

The provisions of the code relating to appointments of receivers in proceedings to dissolve insolvent corporations expressly confer upon the directors or officers of corporations, as such, the right to apply for the very relief which was, in effect, granted to the plaintiff herein. When the stock, effects and property of a corporation are not sufficient to pay all its just demands or to afford a reasonable <sup>252</sup> security to those who may deal with it, or if for any other reason the interests of the stockholders require it the officers of the corporation may ask for its dissolution and for the appointment of a receiver: Code Civ. Proc., c. 17, tit. 11 secs. 2419-2423. In such a case, as will be observed, the officers are not required to resign, but the action is to be instituted by them in their official capacity. There are other forms of actions, by and against corporations and their officers, in which receivers may be appointed, but they are not germane, and to cite them would serve to confuse rather than enlighten us in the consideration of the case at bar.

When we come to consider the general right of officers and directors of corporations to resign, we are at once reminded of the limitations of the question certified to us. We may admit, for the purposes of this discussion, that as a general rule such officers may resign at will, and that the validity of such resig-

nations does not depend upon their formal acceptance: *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790; *Noble v. Euler*, 20 App. Div. 549, 47 N. Y. Supp. 302. But here the question is whether the resignations of all the officers and directors of the defendant corporation, "for the purpose of enabling this action to be brought and a receiver of the property of the corporation to be appointed," are legal and effective. As we have already said, we do not think the provisions of subdivision 3 of section 1810 of the code were intended to cover such a case, nor do we believe, independently of the statute, that any rule of law or morals can justify the simultaneous resignation of all of the officers of a corporation for the purpose of enabling one of their number to go into court and say that the corporation is without officers to preserve its assets. In a close corporation like the one at bar such a proceeding may do no real harm, but it can easily be understood how much evil might result if it were to be engrafted upon the law of corporations. Indeed, the situation here furnishes a mild illustration of what might be possible if such omnibus resignations, made for such purposes, should receive the sanction of the courts. A corporation might be mismanaged almost, but not quite, to the <sup>253</sup> verge of insolvency, and then, when creditors become anxious and importunate, its unfaithful or inefficient officers could resign in a body and thus make their own wrong or incapacity a legal obstacle to the prompt and regular enforcement of just claims against the corporation. The law has gone far enough in the protection of corporations by providing that when they are insolvent, creditors may be compelled to accept ratable payment upon their claims; it should not go further and declare that, whether insolvent or not, corporations may escape or delay the payment of their just obligations.

Morawetz, in his work on *Corporations* (volume 1, section 563), supports the view above expressed with the statement: "It seems clear, also, that directors cannot terminate their agency or accept the resignation of others if the immediate consequence would be to leave the interests of the company without proper care and protection." Two decisions in this state must be noticed, although neither is directly in point. In *Smith v. Danzig*, 64 How. Pr. 320, Mr. Justice Pratt at special term held that the directors of a corporation may lawfully resign when it is evident that it is going from bad to worse, and when such action is necessary to secure a fair and equal



distribution of the corporate property among creditors. It is to be noted that although that decision was made in 1883, it contains no reference or allusion to subdivision 3 of section 1810, which was first enacted in chapter 151, Laws of 1870, and that when it was made, and until 1889, there was no provision for the appointment of a temporary receiver in an action for the voluntary dissolution of a corporation: Laws 1889, c. 314. That case is, therefore, not an authority applicable to the present state of the law. In *Carnaghan v. Exporters etc. Oil Co.*, 32 N. Y. St. Rep. 1121, 11 N. Y. Supp. 172, Mr. Hornblower, as referee, quotes with approval the foregoing statement of Mr. Morawetz, but decided that the resignations then before the court were illegal upon other grounds.

Our conclusion is that the certified question above set forth must be answered in the negative, and, as that is decisive of <sup>254</sup> the case, the others need not be answered. As the order below is here only on the receiver's appeal, it must be affirmed, with costs.

Parker, C. J., O'Brien, Bartlett, Haight, Vann and Cullen, JJ., concur.

Order affirmed.

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## THE RESIGNATION OF OFFICERS IN A CORPORATION.

### I. The Right to Resign.

- a. In General.
- b. As Affected by the Motive or Purpose of Resignation.
- c. Necessity of Accepting Resignation.
- d. Of Appointing a Successor.

### II. The Resignation.

- a. Mode and Manner of Making.
- b. What Amounts to a Resignation.
- c. Effect of Resignation.

### III. Contract to Resign Office.

- a. Validity and Effect of.

#### I. The Right to Resign.

a. In General.—Generally speaking, as is conceded in the principal case, an officer in a corporation may resign at will. If the statutes, charter, and by-laws impose no limitation, he may, under ordinary circumstances, sever his connection with the corporation at any time: *Savannah Cotton Mills v. Cunningham*, 100 Ga. 468, 28 S. E. 435; *Squires v. Brown*, 22 How. Pr. 35; *Blake v. Wheeler*, 18 Hun, 496. And, in doing so, he need give no notice to the public nor to persons dealing with the corporation: *Bruce v. Platt*, 80 N. Y. 379. It may be argued that he owes the duty to stockholders

and the public to continue in the discharge of his duties during the term for which he is elected. This may be true. But the interests of shareholders and others having to do with the corporation are not likely to be best subserved by continuing an unwilling officer in office.

**b. As Affected by the Motive or Purpose of Resignation.**—While the general right of a corporate officer to resign at pleasure is undoubted, still his resignation may be so colored by the motive that actuates him as to render the resignation ineffectual. The motive or purpose moving him to make the resignation is an important test of its legality: *Carnaghan v. Exporters' etc. Oil Co.*, 32 N. Y. St. Rep. 1121. Thus, where the shareholders transfer their stock, and the officers resign their offices, for the purpose, and with the intention of preventing the bringing of any suit, or the service of any process, against the corporation, such resignations are ineffectual to prevent service: *Evarts v. Killingworth*, 20 Conn. 447. And in the principal case, ante, p. 574, it is decided that a resignation of all the officers of a corporation for the purpose of enabling a receiver to be appointed is ineffective. However, when the motive and purpose are proper, the directors may all lawfully resign: *Smith v. Danzig*, 64 How. Pr. 320. In that case, it appeared that the corporation was going from bad to worse, and that such action was necessary to secure a fair and equal distribution of the corporate property among creditors.

**c. Necessity of Accepting Resignation.**—Since an officer may resign, as a rule, at pleasure, no action on the part of the corporation is essential to make his resignation effectual. Acceptance thereof by the directors or governing body is not required. When he tenders his resignation to the proper corporate authorities, to take effect immediately, the resignation is complete, though it is not acted on by the corporation, or entered in its books: *Chandler v. Hoag*, 2 Hun, 613, affirmed in 63 N. Y. 624; *Noble v. Euler*, 20 App. Div. 548, 27 N. Y. Supp. 302; *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 50 N. E. 790; *International Bank v. Faber*, 86 Fed. 443.

Service of process on a director who has sent in his resignation does not bind the corporation, notwithstanding the resignation has not been formally accepted, and his withdrawal reduces the number below the minimum allowed by law: *Wilson v. Brentwood Hotel Co.*, 37 N. Y. Supp. 655, 16 Misc. Rep. 48.

**d. Of Appointing a Successor.**—Nor is the validity of a resignation dependent upon the appointment of a successor in office: *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790. And the fact that a statute requires directors, unless removed, to continue in office until their successors are appointed, does not prevent a director from resigning at any time: *Briggs v. Spaulding*, 141 U. S. 132-154, 11 Sup. Ct. Rep. 924; *Fearing v. Glenn*, 73 Fed. 116, 19 C. C. A. 388.

But when the by-laws of a corporation provide that the directors

shall serve until their successors are appointed, service upon a director who has tendered his resignation, but whose successor has not been appointed, has been held binding upon the corporation: *Timolat v. S. J. Held Co.*, 17 Misc. Rep. 556, 40 N. Y. Supp. 692, citing *Badger v. United States*, 93 U. S. 599.

## II. The Resignation.

**a. Mode and Manner of Making.**—Unless prescribed in the charter or by-laws of the corporation, no special form of resignation is necessary. Putting a resignation in writing is the more orderly and proper course of procedure, but if the fact exists and is adequately proved, an oral resignation is equally valid: *Briggs v. Spaulding*, 141 U. S. 132-154, 11 Sup. Ct. Rep. 924; *Movins v. Lee*, 30 Fed. 298; *Fearing v. Glenn*, 73 Fed. 116, 19 C. C. A. 388.

**b. What Amounts to a Resignation.**—The question whether or not a resignation is effected is one of fact, and the finding thereon by the trial court, unless the evidence on the issue is so one-sided as to show an abuse of discretion, will not be disturbed on appeal: *Mott Iron Works v. West Coast Plumbing Supply Co.*, 113 Cal. 341, 45 Pac. 638; *First Nat. Bank v. Lamon*, 130 N. Y. 366, 29 N. E. 321. Of course, there must be proof of an intent to resign or vacate: *Berry v. Cross*, 3 Sand. Ch. (N. Y.) 1. And language showing no more than intention to resign in the future is not sufficient to show a resignation: *Union Nat. Bank v. Scott*, 66 N. Y. Supp. 145, 53 App. Div. 65. The acceptance of an office incompatible with the one already held may amount to a resignation of the latter. But taking a situation under a void charter or act of incorporation is not a resignation of a situation in another existing corporation: *Regents of University v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72. When by the terms of the charter of a corporation the directors are to be elected annually for one year, but there is no provision as to their holding over until their successors are elected, still they may, by the general rules of law, so hold over, yet there is no such rule that compels them to. And if a director sells out his stock, and ceases to take any part in the management of the affairs of the corporation, he is not bound to see that a successor is elected, nor to tender any formal resignation, in order to escape liability for acts of mismanagement at the time of the dissolution of the corporation some five years after he has thus severed his connection therewith: *Sturges v. Vanderbilt*, 73 N. Y. 384.

**c. Effect of Resignation.**—The liability of an officer in a corporation, as such, terminates upon his resignation: *Bruce v. Platt*, 80 N. Y. 379; *Chemical Nat. Bank v. Calwell*, 132 N. Y. 250, 30 N. E. 644. And his right to his salary thereafter accruing, if he resigns unconditionally or upon a condition not binding upon the corporation, also ceases: *Savannah Cotton Mills v. Cunningham*, 100 Ga.

468, 28 S. E. 435; Merrill v. Wakefield Rattan Co., 37 N. Y. Supp. 64, 1 App. Div. 118.

Service of process upon an officer who has resigned his position and severed his connection with the corporation does not bind it: Buchanan v. Prospect Park Hotel Co., 35 N. Y. Supp. 712, 14 Misc. Rep. 435. But if, in quo warranto proceedings charging the defendants with having usurped an office, they resign after having been served with process, their successors, as to the unexpired term, are bound by the judgment: State v. McDaniel, 22 Ohio St. 354. Where, after the service of an injunction on the corporation, a director makes a bona fide resignation, and as an individual sues the corporation upon a debt due him, he does not thereby subject himself to contempt; Mexican Ore Co. v. Mexican Guadalupe Min. Co., 47 Fed. 351.

The resignation of the officers of a corporation does not operate to destroy its existence. Officers and agents are necessary to the management of the affairs of a corporation, but it has an existence per se, so as to maintain succession and hold and preserve its franchises, though its functions may, for the time being, be suspended for want of means of action: Muscatine Turn Verein v. Funck, 18 Iowa, 469. If one trustee resigns, leaving only two, when the act of incorporation requires that the corporation be managed by no less than three, the remaining two have authority to transfer corporate property in payment of a loan made to the corporation: Fastle v. Lewis, 13 Hun, 298.

### III. Contract to Resign Office.

a. **Validity and Effect of.**—An agreement by a director or trustee of a corporation to resign his trust for a pecuniary consideration is contra bonos mores, and a contract based wholly or in part on such an agreement as a consideration is void: Forbes v. McDonald, 54 Cal. 98; note to Ellicott v. Chamberlin, 48 Am. Rep. 333. It is a violation of his trust thus to be bought out of office. He may resign when he pleases, but not to make profit to himself in the matter of the resignation.



## MATTER OF HELLMAN.

[174 N. Y. 254, 66 N. E. 809.]

**PROPERTY, What is.**—A Seat in a Stock Exchange is property, and passes to a receiver or assignee in a bankruptcy. (p. 583.)

**INHERITANCE TAXES**—Seat in a Stock Exchange.—Under a statute imposing transfer or inheritance taxes, and declaring that the words “estate or property” as used therein include all property or interest therein, whether situate within or without the state, a seat in the New York stock exchange of which the owner dies seised is subject to the inheritance or transfer tax. (p. 584.)

**STATUTES.**—The Rule in Case of a Revision of Statutes is, that where the law as it previously stood was settled by adjudication or frequent application of the statute without question, a mere change in the phraseology is not to be construed as a change in the law, unless the purpose of the legislature to work a change is clear and obvious. (p. 584.)

Louis Marshall, George M. Judd and Edward H. Fallows, for the appellant.

George W. Seligman, for the respondents.

**256 CULLEN, J.** The question presented by this appeal is whether a seat in the New York Stock Exchange, of which the deceased died the owner, is subject to the inheritance or transfer tax prescribed by article 10 of the tax law. The surrogate held that the tax was properly imposed. The appellate division by a divided court reversed that decision.

Prior to the enactment of the tax law (Laws 1896, c. 908) the legislation which imposed ordinary annual taxes and that which exacted a tax on the devolution of property by will or intestacy were entirely distinct. The first, in one form or other, had existed from the formation of the government. The latter was of comparatively recent origin. It was settled that under the law as it stood prior to the act of 1896 a seat in the exchange was subject to the inheritance or transfer tax (Matter of Glendinning, 68 App. Div. 125, 74 N. Y. Supp. 190, affirmed, 171 N. Y. 684, 64 N. E. 1121); but it has also been held that it could not be assessed for annual taxation: *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698, 60 N. E. 265. The difficulty in the present case has been occasioned by the revision of the law and the consolidation of the previous legislation into a single statute, the tax law of 1896. In subdivision 5 of section 2 of the statute is given the definition of personal property as used in the chapter or act. It is a repro-

duction of the provisions of law then in force regulating general taxation. Article 10 deals with "taxable transfers" or inheritance tax. By section 220 of the statute (the first section of the article) it is enacted that a certain tax shall be imposed on the transfer of any real or personal property under circumstances therein enumerated. The majority of the court below were of opinion that the definition of personal property already mentioned controlled the provisions of this article and that as the definition did not, under the decisions of this court, include a seat in the exchange, the seat was not subject to the transfer tax. If the statutory scheme of taxation were an original one and the provisions quoted were the only ones which referred to the subject matter, the argument of the learned appellate division would be cogent and probably conclusive. But by <sup>257</sup> a subsequent section of the article on taxable transfers (section 242) new definitions are given applicable to the transfer tax alone: "The words 'estate' and 'property,' as used in this article, . . . shall include all property or interest therein, whether situated within or without this state." That a seat in the exchange is property and passes to a receiver or to an assignee in bankruptcy has been authoritatively determined by the decisions of both this court and the supreme court of the United States: *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Platt v. Jones*, 96 N. Y. 24; *Hyde v. Woods*, 94 U. S. 524; *Page v. Edmunds*, 187 U. S. 596, 23 Sup. Ct. Rep. 200. In the *Lemmon* case we did not question this proposition, but our decision proceeded on the ground that the seat did not fall within what Judge Vann termed "the somewhat restricted definition of the tax laws."

In determining the construction to be given to the broad and comprehensive language of section 242, we must consider that the statute has a history plainly indicating the trend of legislative action and that as to the transfer tax it is a literal reproduction of the then existing law. First enacted in 1885 (chapter 483) the inheritance tax law was limited to property passing to collateral relatives. It was subjected to repeated amendments, the effect of which in nearly every instance was either to enlarge the class of persons subject to the tax or to extend its application to some species of property which the courts had held not to fall within its terms. The distinction between property justly subject to ordinary taxation and that liable to the imposition of the transfer tax was early appreciated. In *Matter of Knoedler*, 140 N. Y. 377, 35 N. E. 601, a policy of

life insurance payable to the estate of the deceased was held subject to the tax. In the opinion there rendered Judge Maynard said: "The argument is made that it is only property which is liable to taxation under the general tax law of the state which can be taxed under the act relating to taxable transfers, and that, inasmuch as life insurance policies cannot be included in the valuation of a taxpayer's property under the general law, they cannot be considered in assessing a <sup>258</sup> tax upon the collateral inheritance. The main premise upon which this proposition rests is manifestly inadmissible. The taxable transfer law has no reference or relation to the general law . . . it proceeds upon a new theory of the right of the government to tax and establishes a new system of taxation. It takes the right of succession to property and measures the tax in the method specifically prescribed. All property having an appraisable value must be considered, whether it is such as might be taxed under the general law or not. Many kinds of property might be enumerated which are not assessable under the general law, but which are appraisable under the collateral inheritance tax." Such was the settled construction of the inheritance tax laws when the act of 1896 was passed. That act, as already said, was a revision of the existing law, and an attempt to bring into a single statute all existing legislation relative to taxation by the state. In *Henavie v. New York Cent. etc. R. R. Co.*, 154 N. Y. 281, 48 N. E. 526, Judge Vann said: "The rule in the case of a revision of statutes is that where the law, as it previously stood, was settled either by adjudication or by frequent application of the statute without question, a mere change in the phraseology is not to be construed as a change in the law, unless the purpose of the legislature to work a change is clear and obvious." Therefore, because section 242 prescribes that "all property" shall be subject to the transfer tax and because the revision of the statute should not be held to work a change in the settled law unless the legislative intent to that effect is clearly manifest, we are of opinion that the seat held by the testator was subject to the tax imposed upon it.

The order of the appellate division should be reversed and that of the surrogate affirmed, with costs.

Parker, C. J., O'Brien, Bartlett, Haight, Vann and Werner, JJ., concur.

Order reversed, etc.

*A Sett in a Stock Exchange* is, in a sense, property. It may be pledged: *Nashua Sav. Bank v. Abbott*, 181 Mass. 531, 92 Am. St. Rep. 430, 63 N. E. 1058. But it has been held not taxable: *San Francisco v. Anderson*, 103 Cal. 69, 42 Am. St. Rep. 98, 36 Pac. 1034; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698, 60 N. E. 265; nor subject to execution: *Lowenberg v. Greenebaum*, 99 Cal. 162, 37 Am. St. Rep. 42, 33 Pac. 794. Compare *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63, 20 Pac. 874.

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## RICE v. EUREKA PAPER COMPANY.

[174 N. Y. 385, 66 N. E. 979.]

**MASTER AND SERVANT—Assumption of Risk of Dangerous Appliances.**—If a master furnishes an employé with a machine which is not reasonably safe, and the latter accepts the employment with a full knowledge of the defect and danger, he voluntarily assumes the risk incident thereto, and, if injured, cannot recover from his employer. (p. 587.)

**MASTER AND SERVANT—Assumption of Risks by Remaining in Service After a Promise to Repair or Remedy Defects.**—If a master furnishes a dangerous appliance with which his employé is to work, and the latter complains of a defect in the appliance, and a consequent danger to himself, and the master thereupon promises to repair, the former does not, by remaining in the service for reasonable time, assume the risks. On the contrary, the master takes upon himself the responsibility of any accident which may occur. (pp. 588, 594.)

**MASTER AND SERVANT—Promise to Repair Within a Reasonable Time, What Construed to be a.**—If an employé complains that the condition of an appliance in use by him is dangerous, and declares that he will quit work unless the danger is removed, and is thereupon assured that the mill will be shut down for other repairs in the fore part of the following week, and that while it is thus shut down the danger will be removed, this assurance is not equivalent to a promise to repair at once, but is capable of a construction that it is to be fulfilled within a reasonable time, and the employé, by remaining in the employ until the following Wednesday, does not assume the risks of the danger, and is not precluded from recovering in case of his injury by the peril complained of. (p. 595.)

Frank C. Sargent, for the appellant.

James Devone, for the respondent.

**387 WERNER, J.** This action is brought to recover damages for injuries sustained by plaintiff through defendant's alleged negligence. The facts, which for the purposes of this appeal must be taken as true, are briefly as follows: In April, 1900, and for a number of years prior thereto, the defendant was engaged in the manufacture of paper in its mill located



at Oswego Falls, New York. As part of its equipment it had a machine known as a "rag cutter" which was on the second floor of the mill almost directly over the main power shaft which extended through the first story of the building near the ceiling. This "rag cutter," roughly described, consisted of a feed table about three feet long, one end of which connected with a large slowly revolving cylinder, with teeth or spikes upon its circumference. Underneath this cylinder was a stationary plate and behind this an arrangement of rapidly revolving knives. The rags, rope and other materials to be cut up were fed into the machine by the operator who stood at the end of the feed table. As this material reached the spiked cylinder it was drawn in and subjected to pressure which brought it into contact with the <sup>388</sup> knives where it was cut into small fragments. Near the end of the axle or shaft of this machine, but beyond the reach of the operator when standing at his position in front of the feed table, were two pulleys, one tight, the other loose, and both covered by a box. On the power shaft in the lower story there were also two pulleys similarly arranged. These two sets of pulleys were connected by a belt which, when on the tight pulleys, transmitted the power from the main shaft to the rag cutter and set it in motion. The only way in which this machine could be stopped in the room where it was located was to lift the cover or box from the pulleys on the machine's axle and, with a stick, to guide the belt from the tight pulley to the loose one; and in starting the machine this process was, of course, reversed. If the power was to be shut off at the main shaft, that was done on the floor below by means of a longer stick with which the belt was shifted to the loose pulley on the power shaft. Beyond these contrivances there were no means by which the machine could be stopped when the power shaft was in operation. Belt shifters and belt tighteners were then in common use in other mills upon machines of this character and by their use an operator could, without leaving his position, stop his machine almost instantly. Defendant then had in its mill a belt tightener which had been made for this machine, but which, for some unexplained reason, had not been used. On the fourth day of April, 1900, while the plaintiff was engaged in feeding this machine, his right hand became entangled in a mesh of string, and was being drawn slowly toward the spiked cylinder. In attempting to disengage it, the other hand was also caught in the mesh and both were drawn to the cylinder and upon the

knives, where they were so mangled that the right hand was utterly destroyed and the left one was annihilated, with the exception of a small portion of the palm and a single finger. At this time the plaintiff had been employed by the defendant for nearly eighteen months, and had been operating this machine for over a year. He was forty years of age, ordinarily bright, and fully understood the construction and operation <sup>389</sup> of this machine. He knew that a belt tightener had been made for it, but not used, and he was aware of the danger incident to the operation of the machine without either a belt shifter or a belt tightener. This is clearly established by his testimony to the effect that on the Saturday night preceding Wednesday on which he was injured he told defendant's treasurer that the machine ought to be provided with a shifter, and that he would quit if one was not put on. He says that the treasurer then told him the mill would be shut down for other repairs the fore part of the following week, and while shut down they would put on a shaft or a tightener, and that, relying upon this promise, he continued work until he was injured.

Upon these facts two propositions are so clearly established that they are practically conceded. The first is that the defendant, as employer, furnished to the plaintiff, as its employé, a machine that was not reasonably safe, because it lacked the necessary appliance to stop it quickly in case of accident. The second is that the plaintiff, by accepting employment upon this machine, with full knowledge of its defects and dangers, voluntarily assumed the risks incident thereto; and this is equally true whether we regard the machine as lacking in improved appliances which the defendant was under no legal obligation to adopt, or as defective in respect of repairs which it was the defendant's duty to make. If there were nothing further in the case, the bare statement of these two propositions would conclusively bar plaintiff's claim for damages. But we must assume for the purposes of this appeal that there was a promise on the part of the employer to remedy the defects in the machine, in reliance upon which promise the employé remained at work, instead of quitting, as he had threatened to do. This is the point upon which the case turns. The plaintiff testified that on the Saturday night before the accident he told the treasurer of the defendant that this machine ought to have a shifter or tightener on it, and that he would quit work unless one was put on. He

says that the treasurer told him the mill would be <sup>390</sup> shut down for other repairs the fore part of the next week, and while it was shut down they would put on a shifter or a tightener. The plaintiff further says he believed this and relied upon it or he would not have remained at work. He did stay and, on the Wednesday of the "next" week, before the mill was shut down or a shifter or tightener put on the machine, he was injured as described. Upon this evidence the plaintiff contends that the assumption of risk, which would ordinarily bar his right of action, was suspended during the running of the promise to repair, and for a reasonable time after the period when it was to be fulfilled. The defendant meets this argument with the assertion that such a promise, if made, cannot suspend or shift the risk assumed by the employé, because it was a promise not to be performed at once, but at a future time; that during the interim between the promise and the time for its fulfillment, and for a reasonable period thereafter, the plaintiff remained at work as much at his own risk as before the promise was made, because he knew it was not to be fulfilled at once, but at a later and specified time. The narrow and concrete question presented by these conflicting claims is whether such a promise at once absolves the employé from the risk which he had theretofore voluntarily assumed, or whether the risk is continued until the time when the master's promise to repair is to be fulfilled. Before proceeding to analyze the promise upon which plaintiff's cause of action and defendant's liability depend, let us consult the text-writers and the reported decisions upon the subject. Judge Cooley, in his work on Torts (pages 559, 560), says: "If the servant having a right to abandon the service, because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover the assurances remove all ground for the argument that the servant, by continuing in the employment, engages to assume the risk. So far as the particular <sup>391</sup> peril is concerned the implication of law is rebutted by the giving and acceptance of the assurance, for nothing is plainer or more reasonable than that the parties may and should, where practical, come to an understanding between themselves regarding matters of this nature." Judge Thompson, in his work on Negligence (volume 2, page 1009), thus

states the rule: "But a servant does not by merely continuing in the service, after knowledge of defects in the machine which he is obliged to use, assume the risks attendant upon the use of such machinery. Such a result only follows where he continues in the service without objection or protest, or without being induced by his master to believe that a change will be made. If the master promises to remedy the defect, or has held out inducements to the servant to remain in the service, the mere fact of his having remained in the service will not, of itself, exonerate the master from liability. If the servant, after acquiring knowledge of the defect, complains of it to the master, and the master assures him that it will be repaired in a reasonable time, he will not be presumed to have waived the defect by remaining for such reasonable length of time in the service." Other well-known text-writers state the rule in substantially similar terms: 1 Shearman and Redfield's Law of Negligence, 5th ed., sec. 215, p. 372; Bailey on Master's Liabilities for Injuries to Servants, 207; Dresser's Employers' Liability for Injuries to Servants, sec. 115, p. 583; Whittaker's Smith on Negligence, 172; Burrows on Negligence, 120; Wood's Law of Master and Servant, p. 753, sec. 380.

The following English authorities support the doctrine laid down by the text-writers above cited: *Holmes v. Worthington*, 2 Fost. & F. 533, is to the effect that if a servant complains of the defect, and the master promises to repair it, the servant will not be defeated merely because, relying on the promise, he continues to work. In *Holmes v. Clarke*, 6 Hurl. & N. 357, it was held that there may be many cases where a servant can reasonably incur the risk of working on defective appliances instead of abandoning the service; and, if the servant complains of the defect <sup>392</sup> to his master and the master promises to repair, it must be considered that the master takes upon himself the responsibility of any accident that may occur.

The United States supreme court and many of the state courts have also applied the same doctrine to a great variety of cases. In *Hough v. Railway Co.*, 100 U. S. 225, the defendant made use of an engine having a defective pilot. Plaintiff's intestate, the employé, had been aware of the defect for some time; he had complained of its condition to the defendant's foreman; a new pilot had been made, but by reason of the negligence of the defendant it was not put on the engine. Upon these facts the supreme court, in an opinion by Mr. Justice Harlan, approved of the rule as stated by Judge



Cooley. In Illinois there are many cases illustrating the rule. In *Swift v. O'Neil*, 187 Ill. 337, 58 N. E. 416, it was held that a servant did not assume a risk under a promise to repair where the master failed to place proper and suitable lights in the premises, although the servant knew of such condition. The court distinctly stated that where a master makes a promise to repair, he, and not the servant, assumes the risk between the time of the promise and the time for its fulfillment and for a reasonable length of time afterward. To the same effect are *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Weber Wagon Co. v. Kehl*, 40 Ill. App. 584; affirmed, 139 Ill. 644, 29 N. E. 714; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 578, 36 N. E. 572; *Illinois Steel Co. v. Mann*, 170 Ill. 200, 62 Am. St. Rep. 370, 48 N. E. 417; and *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714. So, in Wisconsin the rule was approved in *Ferriss v. Berlin Machine Works*, 90 Wis. 541, 63 N. W. 234; and in Iowa, in the cases of *Stoutenburgh v. Dow & Gilman Co.*, 82 Iowa, 179, 47 N. W. 1039, and *Greenleaf v. Dubuque R. R. Co.*, 33 Iowa, 52. The same is true of Michigan (*Lytle v. Chicago etc. R. Co.*, 84 Mich. 289, 47 N. W. 571; *Roux v. Blodgett & Davis Lumber Co.*, 85 Mich. 519, 24 Am. St. Rep. 102, 48 N. W. 1092), of Minnesota (*Snowberg v. Nelson Spencer Paper Co.*, 43 Minn. 532, 45 N. W. 1131; *Harris v. Hewitt*, 64 Minn. 54, 65 N. W. 1085), of Ohio (*Manufacturing Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 669), of Missouri (*Conroy v. Vulcan Iron Works*, 393 62 Mo. 35), of Pennsylvania (*Patterson v. Pittsburgh etc. R. R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412), and Texas (*Gulf etc. Ry. Co. v. Donnelly*, 70 Tex. 371, 8 Am. St. Rep. 608, 8 S. W. 52). In Massachusetts (*Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530), it has been held that such a promise is a circumstance to be considered by the jury in determining whether the servant or the master has assumed the risk.

It is to be noted that in all of the authorities above referred to the promise to repair has been spoken of in general terms and without emphasizing the point whether it was to be fulfilled at once, within a reasonable time, or at some definite future period. Some of the courts have drawn a distinction between a promise to repair at once, or within a reasonable time, and a promise to repair at a stated time in the future; and that is the theory upon which the very able discussion of

Mr. Justice McLennan proceeded in the court below. Examples of this latter class of cases in other states may be found in *Standard Oil Co. v. Helmick*, 148 Ind. 460, 47 N. E. 14; *Indianapolis etc. Ry. Co. v. Watson*, 114 Ind. 30, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824, and *Wilson v. Winona etc. R. R. Co.*, 37 Minn. 326, 5 Am. St. Rep. 851, 33 N. W. 908. In the *Helmick* case the defect complained of was an improperly fitted crank on a candle machine upon which the servant was employed. The master had ample notice of the existence of the defect and promised to repair it. The court in discussing this promise said: "But here the promise was not made to repair generally, which would imply that it was to be done within a reasonable time. The promise was to repair as soon as as the present order was run out. How long that would take, whether a week, thirty days, six months or a year after the promise was made, is not found. For aught that appears it may have required thirty days or six months to run out that order. The promise was to repair at the end of that time. That being so, there could have been no inducement influencing the appellee to remain in the service and work with the alleged dangerous machine during that thirty days or six months, expecting the danger to be obviated as is the case where the promise is to repair generally, implying that it is to be done within a reasonable time." In the *Watson* case, the <sup>394</sup> discussion was over an alleged promise by the master to furnish his watchman with a lantern. Although the court there finally concluded that no such promise had been made, it said, "Now, if there had been a promise to furnish a lantern at the end of thirty days that would not relieve the plaintiff from the risk incurred by working without a lantern for that thirty days when he says he had no expectation that a lantern would be furnished." In the *Wilson* case it was held "that a conditional promise by defendant's foreman to repair, if he gets time on some Saturday evening," is insufficient to take the case out of the general rule and that the servant assumed the risk.

Coming now to the decisions in this state, we find that, while the question involved in the case at bar has been incidentally discussed in a number of cases in this court, it has never been actually decided; and although it appears to have been up in several cases in the appellate division it has not been given a prominent or controlling place in the written discussions. In *Healy v. Ryan*, 25 N. Y. Week. Dig. 23, af-

firmed without opinion in 116 N. Y. 657, 22 N. E. 1130, the plaintiff, while employed by the defendant, was injured in a collision caused by a defective brake. He notified the foreman, who had authority to make repairs and who promised to make them. On appeal to the general term of the fourth department it was held that the question of notice to the defendant and the promise to repair were properly submitted to the jury as bearing upon the question of plaintiff's freedom from contributory negligence. In the case of *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 525, 54 Am. Rep. 722, 5 N. E. 358, there was no promise to repair and the injury to the plaintiff was occasioned by a machine that was not out of repair, but was not equipped with certain well-known safety appliances then in use on other kinds of machinery, but not on that particular kind of machines. This court, after stating the reasons why the defendant could not be held liable, remarked: "If the defect had been in the pedal and a promise made to repair that, and yet directions given for its use, it might be otherwise, but here the promise, if there was any, concerned a new appliance not attached to that particular <sup>395</sup> machine nor to any machine of that make." In *Marsh v. Chickering*, 101 N. Y. 400, 5 N. E. 56, the plaintiff, an ordinary laborer in the employ of the defendants, was injured while using a stepladder which was not "hooked or spiked" on the bottom. He complained to defendant's superintendent, who promised several times to have the ladder hooked or spiked. The judgment recovered by the plaintiff in the courts below was reversed in this court upon the ground that the ladder furnished was a reasonably safe appliance about which the servant knew as much as the master, and the fact that the servant "notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if an accident occurred." In *Dowd v. New York etc. Ry. Co.*, 170 N. Y. 468, 63 N. E. 543, plaintiff's intestate was killed in a collision between a car that had been "kicked" from one track to another, and the car under which he was at work. In discussing an exception that arose under the head of assumed risk, the court said: "If he (decedent) knew of the practice (kicking cars), and continued to work without any promise by the defendant to correct its methods, he assumed the danger and waived any claim for damages on account thereof." *Hannigan v. Smith*, 28 App. Div. 178, 50 N. Y. Supp. 845, was a case where the plaintiff, a hod carrier, was

injured by a falling brick which had come down between the upper floor beams that were uncovered and unprotected. The defendant's attention had previously been called to the danger from this source, and he had promised to have the floor planked over, and told the plaintiff to go ahead with his work. The appellate division held that as the plaintiff knew as much about the danger as the defendant, the former was not free from contributory negligence, notwithstanding the promise of the latter to plank the flooring. In *McCarthy v. Washburn*, 42 App. Div. 252, 58 N. Y. Supp. 1125, the plaintiff was employed in removing sand from the defendant's sand bank. The bank caved in and the plaintiff was injured. Several days before the accident the defendant's attention had been called to the dangerous condition of the bank, and he said to the plaintiff, <sup>396</sup> "I will secure the bank in a day or two, and I will warrant you that nothing will happen you." The *Hannigan* case was cited with approval, and a dismissal of the complaint affirmed upon the ground that the danger was as obvious to the plaintiff as the defendant. In *Spencer v. Worthington*, 44 App. Div. 496, 60 N. Y. Supp. 873, the plaintiff, a mechanic in the machine-shop of the defendant, was oiling a tool held by a ram, which moved up and down with great force and rapidity. He was using an oil can with a short spout. This was caught by the ram and bent over upon plaintiff's finger which was so injured that it had to be amputated. Until about three weeks before the accident the plaintiff had used an oil can with a long spout so as to avoid danger. This oil can had been carried away by some one. Plaintiff applied to the foreman for another can with a long spout, and protested several times against being compelled to use the can with the short spout. The foreman promised to get another can with a long spout. It was held that despite the promise of the foreman the plaintiff had assumed the risk because the character of the appliance and the danger from its use were as obvious to the plaintiff as to the defendant.

Thus, it will be observed, that the text-writers upon the law of negligence, almost without exception, and a great majority of the reported decisions in other jurisdictions, support the doctrine that if a servant, who has knowledge of defects in appliances or machinery from which danger is to be apprehended, is induced to continue in the employment by the promise of the master to repair the defect, the risk during the running of the promise and for a reasonable time thereafter is that of the



master and not of the servant. In a few of the cases outside of this state, above alluded to, there has been a sharp accentuation of the distinction between a general promise to repair and a promise to repair at a definite future time, and upon this distinction is based the theory, applied in the court below, that under a promise to take effect in the future the risk remains that of the servant, until the time for the fulfillment of the promise and for a reasonable time thereafter. Then, in this state, <sup>397</sup> as we have seen, there are cases in which it has been held that in the case of simple appliances or conditions, such as unspiked stepladders, falling bricks, short-spouted oil cans and insecure sand banks, the servant continues the employment at his own risk notwithstanding the promise of the master to repair or improve. But the decisions in these last-mentioned cases are supported by other principles not involved here, so that it would unduly lengthen this opinion without profit, to attempt to explain or distinguish them.

From the foregoing review of the authorities it is clear that, although the courts of this state have not hitherto had occasion to definitely adopt the rule under which a servant may be relieved from an assumed risk of his employment by the master's promise to remove the danger which creates the risk, the rule is so generally recognized as a part of the jurisprudence of this country, and is so strongly supported by reason and justice, as to justify its adoption by this court. At this point the question arises, however, whether the rule shall be adopted without qualification, or as limited by some of the courts, and particularly by the appellate division, from whose order this appeal is taken. Since, under our construction of the master's promise herein, it may fairly be said to fall within the general rule without qualification, and in view of the fact that under the so-called employers' liability act (Laws 1902, c. 600) now in force, the rule above adverted to may in the future present a question of purely academic interest, we do not now decide the general question whether it would be wiser to adopt the rule in its entirety, or as modified by the limitation referred to. That question we leave open for future decision if it ever arises.

This conclusion leaves nothing further for discussion except our construction of the promise upon which the plaintiff relies, and that can be done very briefly. The defendant's promise to repair the machine upon which the plaintiff was employed was made on Saturday night, at the close of the working week. It

was to the effect that the repairs would be made in the fore part of the following week, when the mill was to be <sup>398</sup> shut down for other repairs. As the plaintiff was only an ordinary laborer, it is not to be presumed that he was in the confidence of his employer to the extent of being informed of the precise time when the mill was to be shut down. For aught that appears in the case, the employer himself may not have known just when that would occur. Under these conditions the plaintiff may have gone to work on Monday morning in the expectation or belief that the mill might be shut down at any moment without further notice to him, and we cannot say as a matter of law that this would have been an unreasonable view of the defendant's promise. The expression, "fore part of the week," was as applicable to Monday or Tuesday as to Wednesday, the day of the accident. The promise made, if not strictly the equivalent of a promise to repair at once, certainly seems to be capable of the construction that it was to be fulfilled within a reasonable time, and if that is true then the plaintiff was justified in remaining at his work because, during that reasonable time, covered by defendant's promise, the risk theretofore voluntarily accepted by the plaintiff was assumed by the defendant.

We, therefore, think that the order of the appellate division should be reversed and the judgment for the plaintiff entered upon the verdict should be affirmed, with costs.

Parker, C. J., Gray, O'Brien, Bartlett, Martin and Cullen, JJ., concur.

Order reversed, etc.

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*If a Servant Protests or Objects* to proceeding with the work on account of a defective appliance, and has a right to abandon the service because it is dangerous, but refrains from so doing because of assurance by the master that he will repair the appliance and remove the danger, such assurances remove all ground for holding that the servant, by continuing in the employment for a reasonable time thereafter, engages to assume the risk: *Yerkes v. Northern Pac. Ry. Co.*, 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961, and cases cited in the cross-reference note thereto; monographic notes to *Gulf etc. Ry. Co. v. Brentford*, 23 Am. St. Rep. 386; *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 234.

## PEOPLE v. POLICE COMMISSIONERS.

[174 N. Y. 450, 67 N. E. 78.]

**RIGHTS—Power to Waive.**—A man may waive any right he has, whether secured by contract, conferred by statute, or guaranteed by the constitution. (p. 599.)

**PUBLIC OFFICE—Waiver of Right to Contest Removal from.** If an officer is removed from his office and retired on a pension, he, by failing for more than three months to protest and by receiving his pension money, surrendering the paraphernalia of his office, seeking and receiving other employment, and by his silence when steps are taken to fill his place, waives his right to object to his removal and to prosecute proceedings for his reappointment. (p. 601.)

**PUBLIC OFFICE—Mandamus to Try Title.**—Mandamus is not a proper remedy to try title to a public office of which another is in possession under color of right. To this rule an exception cannot be admitted on the ground that there is no serious question as to title to the office. (p. 606.)

**MANDAMUS to Try Title to Office—Objections to, When not Waived.**—Where an application for a writ of mandate to compel the applicant's reinstatement in an office from which he claims to have been illegally removed is made, and the incumbent of the office and others intervene, the intervention does not destroy their right to insist that the title to the office cannot be tried on mandamus. (p. 607.)

Isadore J. Beaudrias, Theodore H. Silkman and John H. Wilson, for the appellants.

James M. Hunt, for the respondent.

**453 PARKER, C. J.** On August 17, 1901, the board of police commissioners of the city of Yonkers—being in possession of the fact that James McLaughlin, then captain of police, had, when he became a member of the metropolitan police force, filed a sworn statement setting forth his name, date and place of birth and other matters, from which it appeared that he was, on August 17, 1901, sixty years of age—assumed that, because he had reached that age, it had the statutory authority to place him upon the retired list, and passed a resolution “that Captain James McLaughlin be relieved and retired from the force of the Police department of the city of Yonkers, New York, and placed on the roll of the police pension fund at an annual pension of twelve hundred dollars, payable monthly during his lifetime. This resolution to take effect at 6 P. M., roll-call, August 17, 1901.”

McLaughlin testifies that the following day he went to the police headquarters to get his things and to straighten up,

and a day later, August 19th, he personally delivered at the desk in the station-house his book of rules, revolver, etc., with the following statement in his own handwriting: "Returned by James McLaughlin."

At the end of the month McLaughlin received his salary to August 17th, and for the rest of the month forty-seven dollars and fifty cents out of the pension fund, and gave his receipt therefor. Thereafter until the trial he received and receipted for his pension at the rate of one hundred dollars per month.

454 November 27th following McLaughlin filed with the police commissioners a protest in writing, which was the first protest he had made to that board or any member of it. Two days later he filed a petition for a peremptory writ of mandamus directing his reinstatement, asserting therein that he was but fifty-eight years old.

An order for an alternative writ of mandamus was granted, to which the police commissioners made a return denying that McLaughlin was only fifty-eight years old on August 16, 1901, and alleging that he became sixty years of age on that date; that McLaughlin did not protest to the board of police or any member of it against the resolution of retirement nor ask to be reinstated until the written request and protest of November 27th; that without protest or qualification he received his salary to August 17th and the pension moneys thereafter, for the rest of August and for September, October and November; that such pension fund is not created or recruited by taxation, but constitutes a fund of which the board of police are only trustees; that nearly three weeks after the retirement of McLaughlin, and some days after he had accepted his salary and portion of the pension fund without protest, Frederick H. Woodruff, then a sergeant, was duly appointed captain, and entered upon and has since discharged the duties of said office; and, on information and belief, that all these facts, including the changes and promotions, were well known to McLaughlin at the time they occurred.

Five men promoted after the retirement of McLaughlin—Woodruff, Cooley, Brady, Connolly and Shea—made application for leave to intervene and file a return to said alternative writ. Their application was granted and they made return denying relator's statement as to his age, and the allegation that his removal was illegal, and alleging that McLaughlin was retired and placed on the roll of the police pension fund; that said relator accepted such retirement, and accepted without protest,



and receipted for his salary to August 17, 1901, and his pension thereafter; that, relying upon the action of the board of police commissioners in retiring relator, and <sup>455</sup> upon his acceptance of such retirement, Woodruff, then sergeant, applied for the position of captain, and was duly appointed; that the promotion of Woodruff and the retirement of one Wilcox, a former sergeant, left two vacancies in the office of sergeant, which defendants Cooley and Brady were appointed to fill from the rank of roundsmen; that the latter appointment left two vacancies in the rank of roundsmen, which defendants Connolly and Shea were appointed to fill; that since that date all such defendants have filled those respective offices and received the salaries thereof.

It will be seen that four specific issues were raised by the alternative writ and returns thereto: 1. What was McLaughlin's age? 2. Assuming that McLaughlin was illegally removed, did he by his acts and conduct waive his right to be reinstated? 3. Was the office to which he was seeking reinstatement by mandamus actually in the possession of another, exercising the duties and receiving the salary thereof? 4. Was there any fund from which to pay the relator's claim for salary?

When the trial before the jury was at an end counsel for relator and counsel for defendants each moved for a direction of a verdict, which was denied, the court concluding to take a verdict on the question of McLaughlin's age, suggesting that the legal questions presented by the motions addressed to the court should be reserved. Thereupon relator's counsel said: "Legal questions upon the whole case? The Court: The legal questions presented by the motion as made by respondent's counsel." Whereupon relator's counsel said: "Well, upon that, if your honor please, I can present other proof to the special term upon their alleged claim of waiver, and for that reason I have contended, and still insist, that the only issue before the jury now and before this court at this time is as to age. Whatever other propositions may be asserted upon the case in relation to the whole of the rest of the case upon the captain's application for reinstatement will be asserted in <sup>456</sup> a form that can be met by me. I came here to try only the question of age. The Court: In view of Mr. Hunt's attitude I will deny your motion on the part of respondent and give you an exception upon each ground, and then you may move after rendition of verdict."

The jury found that McLaughlin was only fifty-eight years of age at the time of his removal, and later on defendants made a motion, founded in part upon affidavits, to dismiss the alternative writ, which was denied. The court at special term, however, refused a peremptory mandamus at that time in order to permit the issue tendered by the return—that relator accepted and acquiesced in his retirement—to be sent to the trial term to be determined in a trial by jury. But the judge at the trial term refused to try that issue and granted a peremptory writ of mandamus.

Now, if it be true, as contended by the learned counsel for relator, that “nothing short of an absolute release, signed and sealed, or a written resignation, executed and delivered by the relator and accepted by the police board, under the circumstances shown in this record, would have operated as a matter of law to destroy his right to the office of police captain of the city of Yonkers,” then no injustice has been done defendants by excluding evidence tending to show acquiescence by relator, and waiver of any claim of right, by omitting to submit to the jury the issue thus sought to be raised.

I take it, however, that this claim of counsel does not accurately state the law on that subject. It is well settled by authority that a man may waive any right that he has, whether secured to him by contract, conferred upon him by statute or guaranteed him by the constitution: *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Matter of Cooper*, 93 N. Y. 507; *Matter of New York etc. R. R. Co.*, 98 N. Y. 447; *Mayor etc. of New York v. Manhattan Ry. Co.*, 143 N. Y. 1, 37 N. E. 494.

And if the statements in the returns constitute an accurate presentation of all the facts and circumstances surrounding the retirement of McLaughlin, and of his conduct and that of the police commissioners down to November 27th, a period of <sup>457</sup> three months and ten days, they would permit, in my judgment, a finding of fact that relator acquiesced in the action of the police commissioners, and accepted the benefit secured to him—a pension for life, equal to one-half of his salary—intending to waive any legal claim he had to the office.

I am unable to find in the record the contradiction of any allegation in the returns bearing upon this issue except the statement of McLaughlin that he protested orally to the clerk when, on August 31st, he received a check for the balance of his salary and another for his pension. McLaughlin does not say he ever protested to any member of the police board until

two days before the commencement of this proceeding, or handed the clerk a protest in writing, or requested him to notify the board that he was not satisfied; but, according to his own statement, he contented himself by saying to the clerk that he protested, and asking him if it was necessary to put it in writing, all of which the clerk is unable to recollect.

This issue between the clerk and McLaughlin would have been for the jury to pass upon, and it cannot now be said that it would not have been passed upon in favor of defendants had the court admitted other important evidence which defendants offered in support of this issue. The court refused to allow defendants to prove that Woodruff had been appointed captain; that McLaughlin had been appointed a deputy by Superintendent McCullough, and other facts tending to establish that he acquiesced in the action of the police board until the rights of others and of the public had intervened.

McLaughlin was asked: "And you have since that time been employed as a deputy by Superintendent McCullough? Objected to as immaterial, irrelevant and incompetent. Objection sustained. Exception." The same objection, ruling and exception followed each of the following questions: "And did you receive payment for your services in that employment?" "How long after the retirement, as alleged, was it before your successor was appointed?" "Did you know that they were about to appoint a captain in your place on the sixth day of September, 1901?" "Did you read <sup>458</sup> in the 'Stateman' of September 6, 1901, giving notice of a civil service examination for the purpose of obtaining a list to appoint a captain of police from?"

If he intended to insist that the office was his as matter of right, can there be any doubt that it was his duty to notify the police commissioners and those seeking the position of his intention? Would not his experience also have advised him that it was wiser to do so?

Again taking up the questions excluded under defendants' exception as above, we quote questions asked of Commissioner Treanor: "After the resolution that you have read by the board of police of the city of Yonkers, what action did the board take in regard to filling the vacancy of captain?" "Did you know prior to September 1, 1901, of the surrender by Captain McLaughlin of his keys and the written memorandum which was made and offered in evidence here?" "Did you after September 1, 1901, make any appointment of captain in

the place of Captain McLaughlin, retired?" "Up to what time did you?" "When was Captain Frederick H. Woodruff appointed captain of police?" "Will you turn to the appointment of a captain in the place of Captain McLaughlin?" "Was there any action taken by the board of police of the city of Yonkers to fill the office of captain after the retirement of Captain McLaughlin?" "Is there any fund with which to pay the salary claimed by the relator?"

The facts relied upon to prove relator's acquiescence in the action of the police commissioners, and waiver of any legal rights were (1) his failure to protest against the action of the board for three months and ten days, well knowing the ground of removal; (2) his receipt of pension money in the interim; (3) the surrender of the police paraphernalia; (4) promptly seeking and obtaining employment elsewhere; (5) silence on his part although aware of the fact that steps were being taken to fill his place, which would be likely to further embarrass legal proceedings taken to reinstate him.

Many of the above questions would have invoked answers <sup>459</sup> tending strongly to establish some facts which defendants claimed existed, and upon which reliance was based. And for the error committed in excluding the answers a new trial should be had, even if it be true, as asserted by relator, that he is entitled to have it adjudged in this proceeding whether he is entitled to the office of police captain of the city of Yonkers, an office now held by Captain Woodruff under claim of right.

The claim that this is the proper proceeding in which to seek a determination of relator's claim does not, however, have support in authority in this state, for as long ago as the decision in *People v. Stevens*, 5 Hill, 616, it was held that where title to an office is in dispute the proper method of trying it is by information in the nature of a quo warranto, which since the code is by a direct action instituted by the attorney general. The proceeding was by a mandamus to compel a person claiming to be clerk of the common council of Brooklyn to deliver up the books and papers to relator, who insisted that he had been duly appointed and had taken the oath of office. An alternative writ of mandamus was granted on behalf of relator setting forth that he was duly appointed clerk of the city of Brooklyn in May, 1843, and had taken the oath of office but had been unable to gain possession of the office and the books and papers from the respondent Stevens. To this writ Stevens



returned that he was duly appointed and sworn in as clerk of the city of Brooklyn in May, 1842; that he immediately entered upon the duties of his office and has continued to discharge them ever since, and that by the city charter his term of office did not expire until another clerk should be appointed in his place; and then he returned the facts attending the alleged election of relator as clerk, which he claimed showed that relator had not been appointed to the office; and thereupon insisted that his own term of office had not expired. The relator demurred to the return, insisting that the facts stated therein showed that he had been duly chosen clerk. All of the facts, therefore, relating to the title to the office were before the court. But the court gave judgment <sup>460</sup> for defendant on the demurrer, holding that the title to an office was in dispute; that the only mode for trying it was by an information in the nature of a quo warranto, and that the court would not determine the question on mandamus. Judge Bronson said: "This is professedly a proceeding to put the relator in the possession of the books and papers belonging to the office of the clerk of the city of Brooklyn. It is in fact a proceeding to try the title to an office, both parties claiming it, and the defendant being in possession." This is a leading case on the subject, and has been cited with approval in nearly all the cases in which the question was presented, that have followed it.

In *People v. Vail*, 20 Wend. 12, the proceeding was on information in the nature of a quo warranto, where the relator and defendant were opposing candidates for the office of county clerk, the defendant being in under a former election and holding a certificate of election from the county canvassers. It was held that relator was entitled to the office, and in the course of the opinion the court said of defendant: "He was in under lawful authority, and there was only one mode in which the relator, or anyone else, could question his title."

In *People v. Lane*, 55 N. Y. 217, relator had held for some time the office of assistant clerk of the sixth district court under an appointment by the justice thereof. The said justice, claiming to possess the requisite power, removed relator from his office and appointed one Keating, who took possession of the office and was exercising the powers and discharging the duties of the same when relator filed the petition asking for a mandamus to compel defendants to make and deliver a certificate for the payment of salary. The special term denied the motion. The general term reversed its decision and

directed the mandamus to issue. This court said that the removal of relator and appointment of Keating was under color of law, and the legality thereof depended upon the construction of a statute framed in such ambiguous language as to render its interpretation <sup>461</sup> difficult. After discussing the situation, the opinion concluded as follows: "Indeed, it is doubtful whether the title to an office ought ever to be tried collaterally on proceedings by mandamus instituted in behalf of a party out of possession: *People v. Stevens*, 5 Hill, 616, 627. After a careful examination of the various statutes bearing upon the subject, we think that the legality of the removal of the relator is not so clear that we can dispose of the case against him upon the merits; but we think, for the reasons already stated, that the motion should have been denied on the ground that mandamus is not the proper remedy, and without prejudice to any other proceeding which may be instituted to try the title to the office."

In *Matter of Gardner*, 68 N. Y. 467, the petition of the applicant for the writ of mandamus set forth, in substance, that he was duly elected an alderman of Brooklyn and entered upon the discharge of the duties of such office; that as such alderman he was ex-officio supervisor; that under a subsequent statute one Henry P. Coates had received a certificate of election as supervisor and was recognized as such by the clerk of the board of supervisors; that the statute under which Coates claimed to be elected was in violation of the state constitution and void; and that before commencing this proceeding relator had applied to the attorney general to commence proceedings by quo warranto to try his title to the office, which had been refused. This court held that mandamus should be refused, and in the course of the opinion said that it was settled at a very early period in the judicial history of the state "that when a person is already an officer by color of right the court will not grant a mandamus to admit another person who claims to have been duly elected, and that the proper remedy is by an information in the nature of a quo warranto: *People v. Mayor etc.*, 3 Johns. Cas. 79. This doctrine has since been approved and upheld by repeated decisions and has become settled law: *People v. Stevens*, 5 Hill, 628, 629, and authorities cited; *Morris v. People*, 3 Denio, 396. The rule is distinctly <sup>462</sup> asserted in the cases last cited that the only remedy to try a title to an office is by quo warranto, and to

sustain the position of relator's counsel we would be compelled to overrule these adjudications."

*Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347, was an action to recover damages for the alleged unlawful usurpation of an office by defendant. Plaintiff's intestate, a police commissioner of New York, was unlawfully removed during his term and defendant was appointed in his stead. He assumed the duties of the office against the protests of intestate, who claimed the appointment was unauthorized. The proceedings of the mayor in removing intestate were reversed and annulled on certiorari, whereupon defendant surrendered the office and intestate was again officially recognized by the board and assumed the duties of his office. The court, Judge Andrews writing, carefully reviewed the procedure in such cases and pointed out that where the officer *de jure* has not been reinstated his remedy is by an action in the nature of *quo warranto*. He said: "The courts held that they would not at the instance of a person out of the possession of an office try the title to the office by *mandamus* or other proceeding, but would leave him to his remedy by information, and it has been said in several cases that the title could only be tried in that proceeding: Citing *People v. Stevens*, 5 Hill, 616; *People v. Vail*, 20 Wend. 12; *People v. Ferris*, 76 N. Y. 326; *People v. Lane*, 55 N. Y. 217. These cases proceed upon an intelligible principle."

In *People v. New York Infant Asylum*, 122 N. Y. 190, 25 N. E. 241, the court, in affirming a decision denying *mandamus* where relator claimed to be entitled to the office of secretary of the board of managers, which was then in possession of another, cited with approval from the opinion of the court in *Matter of Gardner*, 68 N. Y. 467, the statement that "it was settled at a very early period in this state that when a person was already an officer by color of right, the court will not grant a *mandamus* to admit another person who claims to <sup>463</sup> have been duly elected, and that the proper remedy is by information in the nature of *quo warranto*": Citing *People v. Stevens*, 5 Hill, 616; *Morris v. People*, 3 Denio, 396.

In *People v. Goetting*, 133 N. Y. 569, 30 N. E. 968, relator was appointed in 1881 clerk of the police court of the third judicial district in Brooklyn. In 1889 he was removed by the justice, and one Degnan was appointed in his stead. Relator then brought a proceeding against the police justice to compel him by *mandamus* to recognize him as the clerk,

and entitled to hold said office. Relator claimed that as an honorably discharged soldier he could not be removed except for cause and after a hearing, relying upon section 299, title 22, chapter 583, Laws of 1888. At special term it was held that such statute did not apply to the case of one whose position was that of a chief clerk of an official, but in this court it was said, Judge Gray writing: "There is, however, this insuperable objection to the maintenance of this proceeding by the appellant, that mandamus is not the proper remedy in such a case. The office claimed is filled by another person, holding under color of right, and the question of title to the office turns upon the construction of statutory provisions. It would be highly inappropriate to determine such a question in a mandamus proceeding. The appropriate remedy, and an adequate one, is by information in the nature of a quo warranto, in which proceeding the incumbent of the office can be heard in his own behalf upon the disputed question. The rule must be regarded as well established by frequent decisions of the courts of this state that the writ of mandamus should be refused to aid the admission of a claimant into an office filled under color of law, and when the title to it presents a disputable question: Citing *People v. Stevens*, 5 Hill, 616; *People v. Lane*, 55 N. Y. 217; *Matter of Gardner*, 68 N. Y. 467; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347. High, in his work on Extraordinary Remedies (section 49), considers such a rule to be 'established by a very overwhelming current of authority.'"

In *People v. Brush*, 146 N. Y. 60, 40 N. E. 502, relator <sup>464</sup> applied for a peremptory writ of mandamus requiring defendant Brush to surrender to relator the office of mayor of Mount Vernon, and that the other defendants, composing the common council, recognize him as mayor. He claimed that at the election of 1894 he received a majority of the votes lawfully cast for mayor, and that on the next day at the regular meeting of the common council the votes were duly canvassed and he was declared elected. In support of his petition he presented the certificate of the city clerk that a resolution to that effect was adopted by the common council, and the affidavit of defendant Brush that he conceded that the relator was duly elected. An affidavit of one of the defendants, an alderman, was heard in opposition, which denied that relator received a plurality of the votes. This court held that mandamus was not the relator's proper remedy, but that he should



have resorted to an action under the code in the nature of quo warranto, and, in addition to citing a number of authorities, already referred to, in support of the decision, quoted with approval the following from Mechem's Public Offices and Officers (section 478): "The proceeding by quo warranto is a proper and appropriate remedy for trying and determining the title to a public office, and of ascertaining who is entitled to hold it; of obtaining possession of an office to which one has been legally elected and has become duly qualified to hold, and also of removing an incumbent who has usurped it, or who claims it by an invalid election, or who illegally continues to hold it after the expiration of his term."

In Matter of Hardy, 17 Misc. Rep. 667, 41 N. Y. Supp. 469, an application was made to compel the mayor of the city of Albany to restore the relator, Hardy, to an office from which he claimed to have been illegally ejected. His successor was a party defendant in the proceeding and was heard in his own behalf, and it was held, citing many authorities already referred to, that inasmuch as Hardy was in possession of the office under color of right, mandamus would not lie.

The learned counsel for relator has not brought to our attention any decision in this state holding that a mandamus <sup>465</sup> will lie where some one is actually in possession of the office under color of right, as is this defendant Woodruff, but he has called attention to expressions in opinions in four of the cases to which we have referred (People v. Brush, 146 N. Y. 60, 40 N. E. 502, People v. Goetting, 133 N. Y. 569, 30 N. E. 968, Matter of Gardner, 68 N. Y. 467, and People v. Lane, 55 N. Y. 270), which he claims suggest an exception to the general rule, namely, that mandamus will lie where there is no serious question as to the title to the office, an exception which, if once created, would destroy the rule itself, rendering uncertain that which is now certain. If such an exception were established, no lawyer could safely advise his client whether his remedy should be by direct action brought by the attorney general, or in a proceeding by mandamus. For while his examination of the situation might satisfy him that the question whether his client or one in possession of the office under a claim of right was entitled to the office was not a serious one, it would be impossible for him to know whether the courts would take that view of it, and the courts, too, would be without any standard by which to determine whether mandamus would lie or a direct action should be brought by the attorney general,

and hence would be compelled to adopt an arbitrary standard, in each case depending upon the point of view of the court called upon to decide it.

If it were an open question, an exception creating such a degree of uncertainty—which in each case could never be definitely determined until a majority of the court of last resort would express an opinion as to whether the question of right to an office was a serious one—should not be created. But it is not an open question, as will sufficiently appear from an examination of the authorities we have cited, including the four cases we have referred to as being relied upon by relator. In every one of those cases, as we have already seen, the court held that mandamus would not lie. That was the point of the decision and nothing else was decided. The fact that in addition to such decision the court in several cases in the course of its argument made use of the expression that a writ <sup>466</sup> of mandamus should not issue where there is a serious question in regard to the title, is not entitled to the force and effect of a decision, where it is not necessary to the decision, and is clearly obiter.

The argument of counsel as to the legal effect of the expression referred to in the cases under consideration is well met by the opinion of this court in *Colonial City Traction Co. v. Kingston City R. R. Co.*, 154 N. Y. 493, 495, 48 N. E. 900, where it is said: "It was not our intention to decide any case but the one before us, which simply involved the standing of plaintiff to make the application in question, and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court."

It is suggested that Captain Woodruff and the other police officers, whose rights are ultimately to be affected by the determination of the questions suggested by this record, have in some way lost their right to insist that this question shall only be determined in that form of action which the courts have decided to be the proper one from the earliest period in the judicial history of this state to the present time—that by intervening to test relator's claim they have parted with the right to insist that he did not select the proper remedy. Such argument as can be made in support of that proposition necessarily proceeds on the theory that the remedy by mandamus

has been denied in such cases always because the parties to be affected were not before the court, whereas the real reason is that common-law mandamus will only issue where there is a clear legal right to the office or thing prayed for; and it is also a general rule that mandamus will not be granted where a party has another specific legal remedy, and from the earliest times the legal remedy for trying the title to an office was by the writ of quo warranto, now a direct action brought by the attorney general. In Blackstone's Commentaries it is said that "the writ of quo warranto was an ancient writ to <sup>467</sup> try the right to one holding a public office": 2 Blackstone's Commentaries, 263.

In the very first case cited by us (People v. Stevens, 5 Hill, 616), the incumbent of the office which the relator was seeking to get possession of by mandamus was a party defendant. The same is true of Matter of Hardy, 17 Misc. Rep. 667, 41 N. Y. Supp. 469, and People v. Brush, 146 N. Y. 60, 40 N. E. 502. This question is, therefore, settled by authority, for it is certainly unnecessary to argue that the defendants' rights are the same in such a proceeding as this one, whether they be brought in on their own motion or on motion of relator.

The judgment should be reversed and proceedings dismissed, with costs.

Gray, O'Brien, Martin and Werner, JJ., concur.

Bartlett and Cullen, JJ., not voting.

Judgment reversed, etc.

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*Mandamus will not lie*, ordinarily, to try title to office: People v. Olds, 3 Cal. 167, 58 Am. Dec. 398, and cases cited in the cross-reference note thereto; monographic note to State v. Dunn, 12 Am. Dec. 28. But see Lawrence v. Ingersoll, 88 Tenn. 52, 17 Am. St. Rep. 870, 12 S. W. 422.

A *Public Officer* may waive his right to his office and the emoluments thereof by acquiescing for years in his illegal removal therefrom: Cote v. Biddeford, 96 Me. 491, 90 Am. St. Rep. 417, 52 Atl. 1019.

## DI LORENZO v. DI LORENZO.

[174 N. Y. 467, 67 N. E. 63.]

**MARRIAGE is a Civil Contract** to the validity of which the free and full consent of the parties is essential. (p. 611.)

**MARRIAGE—Fraud Which Justifies Annulment of.**—Under a statute authorizing a court to annul a marriage when the consent of one of the parties was obtained by force, duress, or fraud, a husband is entitled to a decree annulling a marriage to which he was induced to consent by the fraudulent misrepresentation of the woman that she had previously given birth to a child of which he was the father and which she exhibited to him, when in truth such child was not her offspring. (p. 613.)

Action to annul a marriage on the ground that the plaintiff's consent thereto was induced by the fraud of the defendant. This fraud consisted in the defendant's fraudulently representing to the plaintiff that in October, 1891, during the plaintiff's absence from the state, she gave birth to a child of which he was the father, and which she exhibited to him. Upon a trial before a jury, questions of fact were submitted to it, the findings in response to which were that the parties had not been married by an Italian minister as claimed by the defendant; that for the purpose of inducing plaintiff to marry her, defendant had falsely and fraudulently represented to him that, during his absence from the state, she had given birth to a male child, of which he was the father, and had produced and exhibited such child to him; that, relying upon such representation and believing it to be true, the plaintiff had married the defendant in November, 1891; that the defendant had not given birth to such child or any child in or about October, 1891. The trial court adopted these findings of the jury. It was further found that at the time of the marriage the plaintiff was the owner of real estate of the value of about sixty-five thousand dollars; that there had not been any issue of the marriage; that the parties thereto at the time of the contract of marriage and ever thereafter were residents of the state, and that since the discovery of the fraud the plaintiff had not cohabited with her. Judgment was thereupon entered in favor of the plaintiff annulling the marriage, and an appeal from this judgment having been prosecuted by the defendant to the appellate division in the second part, it was there reversed, and a new trial ordered. From the action of the appellate division the plaintiff appealed to this court.



Byron Traver, for the appellant.

Edward Hymes, Emanuel M. Friend and Michael Schaap, for the respondent.

**470** GRAY, J. The order of the appellate division reversed upon questions of law, only, and the facts as found by the trial court, being undisturbed by the determination of the appellate division, must be taken to be true.

The theory of the decision by the appellate division, as I understand it, is that the fraud in this case was insufficient to warrant the court in annulling the marriage between the parties and that the considerations of public policy, which environ the marriage relation, as a status, so far take it out of **471** the domain of ordinary contracts as to render this conclusion necessary. It was considered that the representations of the defendant "worked no wrong, for which the law, as at present established," would afford any remedy, in the right to an annulment of the marriage. The prevailing opinion of the learned court is very elaborate and clear, and its conclusions are deliberately reached upon a careful consideration of the authorities. In my opinion, however, it errs in failing to give due effect to the statutory provision, relating to the annulment of a marriage for fraud, and in not giving to the element of a free and true consent in a marriage contract that high importance which it has in contracts generally.

The question, therefore, is whether, upon facts establishing that the consent of the plaintiff to marry the defendant was obtained by a fraudulent representation and by a stratagem, causing him to believe that he was the father of the defendant's child, the fraud was of such a material nature, as to warrant the court in decreeing the annulment of the marriage contract. The law of this state, with respect to matrimonial actions, is regulated by statute. The Revised Statutes early conferred upon the chancellor the jurisdiction to declare a marriage contract void and to annul the marriage (2 Rev. Stats. 142), and the Code of Civil Procedure, into which their provisions were carried, confers a general jurisdiction upon the courts of the state, which may be called into exercise for certain causes existing at the time of the marriage. One of those causes is stated to be when "the consent of one of the parties was obtained by force, duress, or fraud"; and the only limitation imposed, where the action is on the ground of fraud, is that it must appear that the parties have not, at any time be-

fore the commencement of the action, "voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud": Code Civ. Proc., secs. 1743, subd. 4, 1750. This language is broad and warrants but the one reasonable construction, that the fraud must be material, to that degree that, had it not been practiced, the party deceived would not have consented to the marriage.

472 The statutes of this state declare that marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of parties, capable in law of contracting, is essential: 2 Rev. Stats. 138. It certainly does differ from ordinary common-law contracts, by reason of its subject matter and of the supervision which the state exercises over the marriage relation, which the contract institutes. In such respects it is *sui generis*. While the marriage relation, in its legal aspect, has no peculiar sanctity, as a social institution, a due regard for its consequences and for the orderly constitution of society has caused it to be regulated by laws, in its conduct as in its dissolution. Judge Story said of it that it is "something more than a mere contract; it is rather to be deemed an institution of society, founded upon the consent and contract of the parties and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belong to ordinary contracts": Story's Conflict of Laws, sec. 108, n. While, then, it is true that marriage contracts are based upon considerations peculiar to themselves and that public policy is concerned with the regulation of the family relation, nevertheless, our law considers marriage in no other light than as a civil contract: *Kujek v. Goldman*, 150 N. Y. 176, 55 Am. St. Rep. 670, 44 N. E. 773. The free and full consent, which is of the essence of all ordinary contracts, is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement and without which he would not have done so, justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract, if he knew that a material representation, entering into the reason for his consent, was untrue. There is no valid reason for excepting the marriage contract from the general rule.

In this case, the representation of the defendant was as to a fact, except for the truth of which the necessary consent of

the plaintiff would not have been obtained to the marriage. <sup>473</sup> It was designed to create a state of mind in the plaintiff, the operation of which would be to yield a consent to marry the defendant, in the belief that he was rectifying a great wrong. The minds of the parties did not meet upon a common basis of operation. The artifice was such as to deceive a reasonably prudent person and to appeal to his sense of honor and of duty. The plaintiff had a right to rely upon the defendant's statement of a fact, the truth of which was known to her and unknown to him, and he was under no obligation to verify a statement, to the truth of which she had pledged herself. It was a gross fraud and, upon reason, as upon authority, I think it afforded a sufficient ground for a decree annulling the marriage contract. The jurisdiction of a court of equity to annul a marriage, for fraud in obtaining it, was early asserted in this state by the court of chancery, at a time when the limited powers of courts of law were inadequate for the purpose. This jurisdiction was expressly rested upon the general power to vacate contracts in all cases, where they had been procured by fraud. From this general jurisdiction of equity a contract of marriage was not regarded as being excepted, when the assent to it was the result of artifice, or of gross fraud: See *Ferlat v. Gojon*, Hopk. Ch. 478, 14 Am. Dec. 554; *Burtis v. Burtis*, Hopk. Ch. 557, 14 Am. Dec. 563. If, as it was observed by Chancellor Sandford in *Ferlat v. Gojon*, Hopk. Ch. 478, 14 Am. Dec. 554, no instance of the exercise of this jurisdiction was to be found in England, it was because the ecclesiastical, or spiritual, courts had cognizance of matrimonial causes; but, he said, the jurisdiction of equity, in cases of fraudulent contracts, seems sufficiently comprehensive to include the contract of marriage.

In *Scott v. Shufeldt*, 5 Paige, 43, the action was to annul a marriage, which the plaintiff had been induced to enter into in order to escape proceedings under the bastardy act, which the defendant had brought against him, upon her oath that he was the father of her child. He, subsequently, ascertained that the child was by a negro. Chancellor Waiworth held that, "if the mother, at the time she charged him (the complainant) as the putative father and induced him to <sup>474</sup> marry her, under the supposition that the child might be his, knowing that it was not his child, but that it was the child of a negro, she . . . intentionally defrauded the complainant in such a manner as to authorize the court to declare the

marriage contract a nullity." The power that was deemed by the court of chancery to be inherent in the court, in the exercise of its equitable jurisdiction in cases of fraud, was, soon thereafter, expressly conferred upon the courts by the legislature of the state. In *Blank v. Blank*, 107 N. Y. 91, 13 N. E. 615, the action was to set aside a judgment annulling a marriage contract between the parties, upon the ground that the plaintiff (the former wife) had been induced, by untrue statements as to the law, to refrain from defending the action. The fraud, upon which the action to annul the marriage had been based, consisted in the woman's representation that she was a widow, whereas she had been collusively divorced from a former husband, who was still living. In affirming the judgment in favor of the defendant, it was said by Judge Rapallo, in the opinion, that, "whether the marriage between the defendant and the plaintiff was legal, or illegal, as matter of law, the fraud, by which she was charged with having induced the defendant to enter into the contract, was sufficient to justify the court in setting it aside, and she does not in any manner attempt to deny that she was guilty of the fraud charged."

Our attention has been called to cases in the courts of this state and of other states, which seem to hold a different doctrine upon the subject of the judicial annulment of a marriage contract. Whatever may be said in explanation, or in differentiation, I think it is sufficient that we rely upon the plain provision of our statute and upon the application to the case of a contract of marriage of those salutary and fundamental rules, which are applicable to contracts generally when determining their validity. If the plaintiff proves to the satisfaction of the court that, through misrepresentation of some fact, which was an essential element in the giving of his consent to the contract of marriage and which was of such a <sup>475</sup> nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage. Such was the judgment of the trial court upon the facts in this case and I think that the learned justices of the appellate division, who concurred in reversing that judgment, were in error in holding that the law of this state afforded no remedy to the plaintiff.

The order appealed from should be reversed and the judgment entered upon the findings of the special term should be affirmed, with costs to the plaintiff in the appellate division and in this court.



Parker, C. J., Bartlett, Haight, Martin, Cullen and Werner, JJ., concur.

Order reversed, etc.

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*Marriage is a Civil Contract:* Hulett v. Carey, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31; McCreery v. Davis, 44 S. C. 195, 51 Am. St. Rep. 794, 22 S. E. 178. The essentials of a valid marriage are capacity and consent: Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; note to State v. Lowell, 79 Am. St. Rep. 370.

*A Marriage Procured by Fraud,* as where antenuptial pregnancy by another is concealed from the husband, may be annulled: See the monographic note to State v. Lowell, 79 Am. St. Rep. 372.

CASES  
IN THE  
SUPREME COURT  
OF  
NORTH CAROLINA.

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SCULL v. AETNA LIFE INSURANCE COMPANY.

[132 N. C. 30, 43 S. E. 504.]

**INSURANCE -Children, Who Participate in as.**—If a policy issues insuring the life of A for the benefit of her children, all her children surviving her are entitled to participate in the benefit, whether born before or after the issuing of the policy. (p. 617.)

Action by Bismarck Scull and others against the defendant insurance company. Judgment for the defendant; the plaintiff appealed.

St. Leon Scull and Francis D. Winston, for the plaintiffs.

George Cowper, for the defendants.

**30** WALKER, J. This case comes to this court by appeal from the judgment of the court below upon a case agreed on by the parties. It appears that in the year 1869 a policy of insurance was issued by the defendant company to Mrs. Nannie Walton, widow of James Walton, by which her life was insured **31** for the benefit of her children, she then having three children, the defendants, Jimmie Flythe and Lily W. Scull and Nannie Nichols, the intestate of the defendant, E. L. Smith.

In the year 1870 Mrs. Nannie Walton married E. D. Scull, and the issue of that marriage were Bismarck Scull, born in March, 1871, and Von Moltke Scull, born in the year 1874, who are plaintiffs in this case.

On the ninth day of April, 1873, Mrs. Nannie Walton, then Mrs. Scull, surrendered the said policy and received from the company in lieu thereof a paid-up policy for the sum of seven hundred and twelve dollars, which was issued in the name of

Nannie Walton, although she was then Mrs. Scull, and was payable to her children within ninety days after due notice and proof of her death. She died in the month of March, 1902, her husband, E. D. Scull, having predeceased her. The company paid the money due upon the last policy into court, under its order and by agreement of the parties, to await the decision as to the distribution of the fund.

The plaintiffs contend, upon the foregoing facts, that they are each entitled to one-fifth of this fund, and the defendants resist this contention and claim the whole, so that the question presented is, whether the children of the first marriage are the sole beneficiaries under the policy or are the children of the second marriage entitled to participate ratably with them in the fund now in court. The court below held that the children of the first marriage were entitled to the fund to the exclusion of the children of the second marriage, and entered judgment accordingly, and in this ruling we think there was error.

It was contended by counsel for the plaintiffs, on the argument before us, that Bismarck Scull was surely entitled to share in the avails of the policy, as he was born before the last policy was issued, but, in the view we take of the case, it is not necessary to consider this question.

“2 A policy of insurance is essentially like a gift by will, the only difference being that in the case of a policy of insurance the beneficiary acquires a vested interest when the policy is delivered, which becomes vested in possession or enjoyment at the death of the assured; while in the case of a gift by will the interest does not vest until the death of the testator. In other respects, and for all practical purposes, they are alike. If a bequest is made to A for life, with remainder to his children, those in esse at the death of the testator take a vested estate, which will open, however, and let in any after-born child during the life of A; and so it is with a policy of insurance payable to children, the interests of the beneficiaries become vested at the time of the delivery of the policy or when it takes effect, as a contract between the company and the assured, as to those then in esse, but will open and let in any after-born children, and, in this case, whether of the first or second marriage. If they come within the general description, they will share under the policy.

The interests are said to be vested, but not in the sense that the children then in esse will take exclusively, but rather in

the sense that the interest of any one of the children, already vested, shall not be divested by his or her subsequent death, and the share of such deceased child will go to his or her personal representative. The late Chief Justice Smith evidently had this distinction in mind, when in the case of *Hooker v. Sugg*, 102 N. C. 115, 11 Am. St. Rep. 717, 8 S. E. 919, which is relied on by the defendant's counsel, he used the following language: "So, if children be designated in a life policy as beneficiaries, the interest vesting at once is in such as then meet the description, and is not divested in favor of survivors by a death afterward." He certainly did not intend by that language to say that after-born children would be excluded and those in esse at the time of the delivery of the policy would be the sole beneficiaries. This is made perfectly <sup>33</sup> clear by the following passage taken from the opinion: "It is unnecessary to consider the possible effect of a future marriage upon the interests of the children, since the event did not take place": *Hooker v. Sugg*, 102 N. C. 120, 11 Am. St. Rep. 717, 8 S. E. 921. So that the question presented in this case and stated hypothetically by the chief justice in that case, was left open for consideration and adjudication when it should arise.

It seems to us that the question has virtually been settled in favor of the plaintiffs by the case of *Coningland v. Smith*, 79 N. C. 303, in which it is held that a policy of insurance for the benefit of children, like a gift by will to them, will vest in interest in the children then in esse, at the time of the delivery of the policy or when the contract of insurance is complete, but will open and let in any after-born children during the life of the assured. As in the case of wills, a policy of insurance should receive a liberal construction, so as to take in as many of the objects of the assured's bounty as possible: 3 Am. & Eng. Ency. of Law, 2d ed., 961, 964. This, in our opinion, is the just and reasonable rule of interpretation. The question seems to have frequently been under consideration by the courts of some of the other states. In *Koehler v. Centennial etc. Ins. Co.*, 66 Iowa, 325, 23 N. W. 687, the policy upon which the suit was brought was payable to the assured's wife and children, there being at the time children by a former marriage; and it was held that the children of both marriages were entitled to share in the avails of the policy. Upon a substantially similar state of facts to those in this case it was held, in *McDermott v. Centennial etc. Life Assn.*, 24



Mo. App. 73, that in the absence of an expression of a purpose to limit the benefit to a particular class of children, it was clearly the intention of the assured to extend it to all his children, and that this intention should prevail. "It would be so held," says that court, "in the interpretation of a will; and a policy of insurance being a postmortem provision for persons dependent upon the <sup>34</sup> assured is to be interpreted upon similar principles." In *Thomas v. Leake*, 67 Tex. 471, 3 S. W. 703, the court held that under the construction the law gives to the word "children," as used in policies of insurance, it does not mean certain named children then in existence, but these together with such as may thereafter be born to the assured: See, also, *Stigler v. Stigler*, 77 Va. 163; *United States Trust Co. v. Mutual Benefit Life Ins. Co.*, 115 N. Y. 152, 21 N. E. 1025; *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 481.

We have carefully examined the authorities cited by the learned counsel for the defendants, and are unable to see that they militate against the views we have expressed. In the case of *Connecticut Mut. Life Ins. Co. v. Baldwin*, 15 R. I. 106, 23 Atl. 105, so much relied on by him, the policy was payable to the wife and children of the assured, and the court held that the children living at the time the policy was delivered were entitled to the money due thereon, to the exclusion of after-born children, but the court placed its decision upon the ground that the wife was a joint beneficiary with the children. We do not think this fact was sufficient to change the general rule of construction in its application to the facts of that case, but however this may be, the court clearly intimates that the decision would have been different if the name of the wife had been omitted and the policy had been payable to the children as a class. "Possibly," says the court, "if the policy had been expressed to be for the benefit of the children only, the doctrine in respect of testamentary bequests to children payable in futuro, namely, that the bequests are payable to them as a class, and that the class will open to let in after-born children, to participate in the bequests, might be applied." This is a statement of our case, and a strong intimation that the rule of construction which we have laid down should apply to it.

In *Herring v. Sutton*, 129 N. C. 107, 39 S. E. 772, also cited by defendant's counsel, the beneficiaries were designated by name, and it necessarily followed that those children who were thus <sup>35</sup> named took a vested interest in the policy, to the ex-

clusion of all other children, for the intention to restrict the benefit of the policy to them was clearly expressed.

It was suggested that the assured had no legal right to surrender the old policy for the new, but we do not think that this should change the rule of construction. Indeed, if the second policy had not been issued, and the money had been paid under the first, the result would be the same. The first policy was payable to the children, and this, as we have already shown, includes after-born children. The change, therefore, from the one policy to the other, whether it was in law a continuation of the old policy or a substitution of the new one for it, is immaterial.

Upon a review of the whole matter, we think there was error in the ruling and judgment of the court below, and that judgment should be entered in that court for the plaintiffs in accordance with the agreement of the parties.

Per Curiam. Judgment reversed.

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*If a Life Insurance Policy is made payable to such children of the assured as may survive him, the beneficiaries are all of the surviving children as a class, and include those born after the issuance of the policy, and those of a second as well as by a first wife: Roquemore v. Dent, 135 Ala. 292, 93 Am. St. Rep. 33, 33 South. 178.*

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## SYKES v. BOONE.

[132 N. C. 199, 43 S. E. 645.]

**TRUSTS**—When not within the Statute of Frauds.—A trust declared when the legal title is transmitted is not within the statute of frauds, and does not require a consideration to support it. (p. 621.)

**TRUSTS**—Consideration, When not Essential to.—An executed trust is good in favor of a volunteer. If declared at the time the legal title passes, it will be enforced, though without consideration. (p. 624.)

**TRUSTS**—Parol to Convey Land to Another.—If a conveyance is induced by the promise of the grantee that he will convey the property to a third person for a specified consideration if requested, this is a valid, enforceable declaration by the grantee that he holds the land on the trust to convey it on the condition specified. (p. 625.)

Action for the recovery of real property. Judgment for the defendants, and the plaintiffs appealed.

Peebles & Harris and W. E. Daniel, for the plaintiff.

Day & Bell and Battle & Mordecai, for the defendant.

**290** WALKER, J. The plaintiff in this action sues for the recovery of real property. The defendant denies his right to recover the possession of the same and pleads a counterclaim, in which she alleges that she applied to Mr. B. B. Winborne, the agent of Miss Vaughan, who was the owner of the tract of land described in the complaint, for the purchase of said land, and Winborne agreed to give her an option to buy the land before he sold it to anyone else.

On the 14th of October, 1899, the plaintiff applied to Winborne for the purchase of the land and Winborne agreed to sell it to him at the price of two thousand dollars, but before the deed was prepared and executed, Winborne notified the plaintiff of his previous promise to the defendant, and that thereupon the plaintiff promised and agreed with Winborne that, if he would let him have the land and the defendant should afterward want it at the price of two thousand dollars, he would either surrender the deed, then about to be executed, to Miss Vaughan and let her convey to the defendant, or he would himself convey directly to the defendant upon payment of two thousand dollars.

There was evidence tending to show that the plaintiff had admitted this promise both before and after the execution of the deed, and there was much evidence to corroborate Winborne who testified to the making of the promise. There was also evidence tending to show that Winborne would not have prepared and delivered the deed if the promise had not been made.

The following issues were submitted to the jury:

1. Did B. B. Winborne, as agent for Rosa Vaughan, agree with the defendant Bessie Boone to give her the refusal of the purchase of the land described in the complaint, as alleged in the answer? Yes.

2. Was the deed from Rosa Vaughan to the plaintiff executed and delivered upon the understanding and agreement upon the part of plaintiff, entered into immediately before **291** and at time of execution of said deed, that plaintiff would convey said land to defendant Bessie Boone for two thousand dollars if she desired it? Yes.

3. Did defendant Bessie Boone decline to take said land at two thousand dollars, as alleged by plaintiff? A. No.

4. Did said Bessie Boone decide to take said land at two thousand dollars, and notify plaintiff and said Winborne within a reasonable time as alleged by the defendant? Yes.

5. Did said defendant Bessie Boone offer to pay plaintiff said two thousand dollars, and interest and expenses as alleged by her? Yes.

6. What damage, if any, is plaintiff entitled to recover?

The court charged the jury that before they could answer the second issue "Yes," the defendant must satisfy them by strong, clear and convincing proof, more than a mere preponderance of evidence, that plaintiff's promise to convey the land to defendant was a part of the inducement moving Winborne to execute the deed, and if the jury found that the promise was the inducement for making the deed, they would answer the second issue "Yes." The court further charged that if it was Winborne's purpose and intention to sell to the plaintiff anyhow and to deliver the deed whether such promise was given or not, and it was not a trust or condition attached to the title, and not intended as such, the jury would answer the second issue "No." The court further substantially instructed the jury that, if Winborne did not exact the promise from the plaintiff as a condition precedent to the making of the deed, and Winborne did not annex any such condition or trust to the transmission of the title or the delivery of the deed, the jury should answer the second issue "No."

The jury answered the second issue "Yes" and they have thereby found as follows: That W. R. Sykes made the promise and that it was the inducement for making the deed <sup>292</sup> and was annexed at the time of preparing and executing the deed, as a condition and trust to the transmission of the legal title.

Why did not the facts thus found create a valid parol trust in favor of the plaintiff which is enforceable in a court of equity? We think they did. It is familiar learning that a trust may be created in any one of the four modes: 1. By transmission of the legal estate, when a simple declaration will raise the use or trust; 2. By a contract based upon valuable consideration, to stand seised to the use or in trust for another; 3. By covenant to stand seised to the use of or in trust for another upon good consideration; 4. When the court by its decree converts a party into a trustee on the ground of fraud: *Wood v. Cherry*, 73 N. C. 110.



The trust in this case comes within the first class, as a declaration of trust was made at the time of the execution of the deed and the conveyance of the legal estate. A trust when so declared is not within the statute of frauds: *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61. Nor does it require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even in favor of a mere volunteer: *Blackburn v. Blackburn*, 109 N. C. 488, 13 S. E. 937; *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61.

We are unable to distinguish this case in principle from the many cases decided in this court, where purchases have been made at public or judicial sales, and the purchaser who paid the money out of his own funds agreed to hold the land subject to the right of the person, whose land he bought, to have a reconveyance of the legal title upon repayment of his outlay. In all such cases it has been held that there was a valid parol trust created in favor of the former owner of the <sup>293</sup> land: *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241; *Shields v. Whitaker*, 82 N. C. 516; *Mulholland v. York*, 82 N. C. 510; *Shelton v. Shelton*, 58 N. C. 292; *Owens v. Williams*, 130 N. C. 165, 41 S. E. 93.

It is true that in some of these cases the purchaser acquired the land at an undervalue because he was known to be buying for the benefit of the defendant in the execution, but if it is necessary that any equitable element should be involved in order to create a valid trust, we have that element in this case, as the jury have necessarily found, under the evidence and the charge of the court, that the plaintiff obtained the deed by reason of his solemn promise and engagement to convey to the defendant upon payment of the purchase money, and that this promise was a condition precedent annexed at the time of the execution of the deed and was what induced Winborne to sell and convey to the plaintiff. It was substantially, therefore, a part of the consideration for the conveyance, and it would be unconscionable and against equity for the plaintiff to take advantage of the deed and to insist upon holding the legal title acquired thereunder, and refused to perform the promise he made in order to procure the execution of the deed. The case, in this view of it, is quite as strong as those in which this court has frequently interfered in behalf of parties seeking to attach a parol trust to the legal estate and to have it enforced by a conveyance of the same.

The case of *Cloninger v. Summit*, 55 N. C. 513, presents a striking analogy to this case. In that case the defendant had agreed with the owner of the land, when the latter conveyed the legal title to him, that he would hold it subject to the right of a third party, to whom the owner had theretofore made a bond for title, to have a conveyance of the title upon payment of the amount specified in the bond. That was held to be a valid parol trust which the court enforced and in its essential features the case is like the one now under decision. <sup>204</sup> It is true the defendant had by procuring possession of the bond for title induced the owner to convey to him, but in this case the plaintiff obtained the deed and conveyance of the legal title by a promise to hold in trust for Miss Boone, to whom Winborne had previously promised the refusal of the land or an option to buy it. Though there may be a slight distinction between the two cases, we see no legal difference.

But the language of this court in the case of *Cousins v. Wall*, 56 N. C. 45, is conclusive against the plaintiff. In that case the owner of the land was under a contract to convey to the plaintiff the land in controversy and, instead of doing so, he conveyed it to the defendant, who paid the purchase money out of his own funds, but at the time of the execution of the deed he agreed to convey to the plaintiff upon payment of the amount of the purchase money.

In commenting upon these facts and after referring approvingly to the case of *Cloninger v. Summit*, 55 N. C. 513, Battle, J., for the court, says: "By paying his money and taking the legal title to himself, defendant held the legal title in trust to secure the repayment of the purchase money, and then in trust for the plaintiff. The defendant never contracted to sell or convey the land, or any interest therein, to plaintiff; for, at the time of the agreement, he had no title or interest in the land, and it was only by the force of the agreement that he was permitted to take the legal title, and by the same act he took it in trust for the plaintiff. It is manifest that the statute of frauds does not apply."

In *Dennison v. Goehring*, 7 Pa. St. 175, 47 Am. Dec. 505, the conveyance had been made to a person who himself paid the purchase money, but the parol trust was declared for another, who happened, it is true, to be the child of the bargainor. It was held that the trust, though voluntary, was valid and enforceable in equity. The fact that the beneficiary was the child of the bargainor was not at all controlling in <sup>205</sup> the

decision of the case, but the reason of the decision was that the trust, having been declared at the time the legal title passed, and being therefore, an executed or perfected trust, as distinguished from an executory trust, or one arising out of an executory agreement, the court would enforce it even in favor of a volunteer, or without any consideration moving from the beneficiary to support it. In that case, Gibson, C. J., says: "The books are full of decrees in favor of children and volunteers. . . . When the legal estate has passed by a conveyance in which a trust is distinctly declared, the trustee will not be allowed to set up want of consideration to defeat it: *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 506, 507."

It is true that all trusts are in a certain sense executory—that is, the beneficiary is under the necessity of coming into the court and invoking its equitable jurisdiction for the enforcement of the trust, and for this reason Lord Hardwick at one time declared that there was no such distinction as that asserted between executed and executory trusts; but from this position he was forced afterward to recede and he finally abandoned it: *Exel v. Wallace*, 2 Ves. Sr. 318; *Bastard v. Proby*, 2 Cox, 8. And now it is held that there never was a time when there was not a substantial difference between executed and executory trusts in this respect—that is, that one is good in favor of a volunteer and the other is not. An executed trust, therefore, if declared at the time the legal estate passes under the deed, will be enforced even without a consideration: *Ellison v. Ellison*, 6 Ves. 656; *White & Tudor's Leading Cases*, 4th Am. ed., 382; *Adams' Equity*, 79; *Read v. Long*, 4 Yerg. 68; *Wyche v. Green*, 16 Ga. 49; *Fletcher v. Fletcher*, 4 Hare, 73.

In *Pittman v. Pittman*, 107 N. C. 163, 12 S. E. 61, Shepherd, C. J., gives a very full and accurate statement of the law with reference to such trusts. He says: "Trusts and <sup>296</sup> uses were raised in the same manner, and if a feoffment was made without consideration, a use resulted to the feoffer, unless the use or trust was declared at the time of the conveyance. Now, it must be observed that no consideration was necessary to a feoffment. The conveyance itself raised the use and separated it from the legal estate. The use so raised would, however, as we have said, in the absence of a consideration, result to the feoffer, unless declared at the time of the feoffment, and this declaration might be voluntarily made by parol, either in favor of the feoffee or a third person. But there was a

great difference in this respect between a conveyance which operated by transmitting the possession, and the covenant to stand seised, which had no operation but by the creation of a new use; and as this use was raised by equity, and equity never acts without a consideration, a consideration was always necessary to the transfer of the interest by this conveyance; whereas, in the case of a feoffment or fine, the use arises upon the conveyance itself. . . . It seems, therefore, that at common law, only the solemn conveyance, by livery or record, could raise the use by its own virtue, and dispense with the deed declaring it, as well as the consideration for raising it: Roberts on Fraud, 92. It appears, then, that at common law no use or trust can be raised in lands without a consideration, except in the single instance of a conveyance operating by transmutation of possession the character of the conveyance alone being sufficient to raise the use, and to dispense with the necessity for a consideration."

When the principles thus laid down by this court are applied to the facts of this case, we do not see why the promise made by the plaintiff to Winborne in behalf of the defendant, at the time the legal title passed to him, was not a valid and enforceable trust. No good reason has been suggested to us <sup>207</sup> why this case should be excepted from the operation of the principles usually applicable to cases of its kind.

We do not think that the decision in *King v. Kincey*, 36 N. C. 187, 36 Am. Dec. 40, militates against the views we have expressed. The agreement, there, was made at the time of receiving the deed and was purely voluntary. The deed was not procured by reason of the promise; indeed, a reconveyance was not contemplated by the parties at the time the deed was executed. Besides, the plaintiff had two years within which to redeem the land and failed to avail himself of the offer of the defendant and the relief seems to have been denied upon that ground.

The assignment of error as to the ruling of the court upon the admissibility of testimony and the refusal to give the plaintiff's first and seventh prayers for instructions involve the same question as the one we have already discussed, and cannot therefore be sustained. We understand that the instruction requested in the plaintiff's fifth prayer was given by the court, or it was at least substantially given to the jury, and that was sufficient.



The sixth prayer was properly refused. The question was whether the trust had been declared at the time the legal title passed to the plaintiff. The promise could have become a part of the consideration even after the terms of the purchase had been agreed upon. It was a superadded consideration, and the jury found, under proper instructions from the court, it was part of the consideration and inducement for making the deed.

We conclude upon a review of all of the authorities that there was a valid trust declared, at the time of the conveyance of the legal estate from Miss Vaughan, in favor of the defendant, and she is entitled to have the same enforced by the conveyance to her of the legal title.

The parol trust is enforceable not in the court of honor <sup>208</sup> alone, as the plaintiff's counsel contended, but in the forum of conscience where right and equity are administered in accordance with those well-established principles which have been found to be best calculated to do justice between the parties, and to compel by legal methods and procedure the fulfillment of solemn engagements.

We believe that the result reached in this case is not only just, but that any other interpretation of the facts of the case, with reference to their legal character and efficacy, would be in contravention rather than in fulfillment of the provisions of the statute, for it has been well said that it is not easy to see how such a trust could be established except by parol evidence, and that if such evidence were not competent "a statute made to prevent frauds would become a most potent instrument whereby to give them success": Bispham's Equity, sec. 95.

The questions as to the tender of the purchase money by the defendant before the suit was brought and as to the costs in the case, have both been settled against the plaintiff: *Cotton Mills v. Abernathy*, 115 N. C. 402, 20 S. E. 522; *Martin v. Bank*, 131 N. C. 121, 42 S. E. 558. There is no error in the rulings and judgment of the court below.

Per Curiam. Judgment affirmed.

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*Under the Statute of Frauds*, the existence of a direct or express trust in lands cannot be established by parol: *Johnson v. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. 905. See, also, *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 477, 44 N. E. 17; *Smith v. Peacock*, 114 Ga. 691, 88 Am. St. Rep. 53, 40 S. E. 757. But a trust which arises by operation of law is not within the statute, and may be established by parol: *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34. See, too, *Talbott v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491, 38 N. E. 487; note to *Jackson v. Cleveland*, 90 Am. Dec. 272-274.

## HAVENS v. BANK OF TARBORO.

[132 N. C. 214, 43 S. E. 639.]

**A CORPORATION IS ANSWERABLE** for the Acts and Neglects of Its Agents while engaged in the business of the agency to the same extent and under the same circumstances that a natural person is charged with the acts and neglects of his agents. (p. 630.)

**A BANK IS ANSWERABLE** for the Acts of Its Cashier done within the apparent, though not within the real scope of his agency. (p. 630.)

**CORPORATIONS—Liability of for Stock Certificate Issued Without Authority.**—If the president of a banking corporation signs blank certificates of stock and leaves them with the cashier to be filled out in the name of the purchasers when called for, and the cashier issues a certificate to himself, using a blank so signed, and borrows money thereon of a person innocent of his fraud, the corporation is liable to the lender for the value of such stock not exceeding the amount of the debt secured thereby. (p. 631.)

**CORPORATION—Stock—Notice, When not Imported by Certificate.**—The fact that a certificate of stock recites that it is transferable only on the stock-book of the corporation does not charge one who loans money on it as collateral security with notice of any defect in the title of the borrower, who is named in such certificate as the holder of the stock therein specified. (p. 635.)

**CORPORATE STOCK—Bona Fide Purchaser of, Who is.**—One is not deprived of his character of bona fide purchaser of stock in a corporation by the fact that the certificate is not surrendered and the transfer noted on the books of the corporation, though such certificate declares that it is transferable only on the books of the corporation. (p. 635.)

Action by Lucy E. Havens against the defendant bank to recover the value of thirteen shares of stock issued to James G. Mehegan, and received by her from him as security for a loan. The defendant corporation was formed in 1895, and thence and until October, 1897, John F. Shackelford was its president and James G. Mehegan its cashier. Its capital stock was not to be less than twenty-five thousand dollars, and it had authority to increase the stock to ten times that sum. The president signed a number of blank certificates of stock and placed them in a safe under the control of the cashier, to be filled out in the name of the purchasers when called for. One of these certificates so signed the cashier made out in favor of himself without any authority and without the knowledge of any officer of the corporation, and also without paying anything therefor. On this certificate he borrowed of the plaintiff five hundred dollars and indorsed and delivered it to her as security. The certificate and the indorsement thereof were as follows:

"Number 10.

Shares 13.

## "THE BANK OF TARBORO.

"Tarboro, N. C.

"This certifies that Jas. G. Mehegan is the owner of thirteen shares of the capital stock of

"The Bank of Tarboro,  
transferable only on the books of the corporation in person or by attorney on surrender of this certificate.

"In witness whereof, the president and cashier have hereto subscribed their names and caused the corporate seal to be hereto affixed at Tarboro, N. C., this 22d day of November, 1895.

JOHN F. SHACKELFORD,

"President.

"JAS. G. MEHEGAN,

"Cashier.

"That there appeared on the back of said certificate the following entries and indorsements, to wit:

"This certificate is subject to an assessment of sixty per cent payable on call of board of directors.

"JAS. G. MEHEGAN.

"Cashier."

"For value received ——— hereby sell and transfer and assign to ——— the shares of stock within mentioned, and hereby authorize ——— to make the necessary transfer on the books of the corporation.

"Witness ——— hand and seal, this ——— day of ———, 189—

"JAS. G. MEHEGAN.

At the time plaintiff made the loan and received the certificate there was a by-law of the corporation of which she had no knowledge, as follows:

"Certificates of stock signed by the president and cashier may be issued to stockholders and the certificates shall state on the face thereof that the stock is transferable only on the books of the bank, and when the stock is transferred the certificate thereof shall be returned to the bank and canceled and preserved, and new certificates issued. But no certificate shall be delivered to any stockholder until his stock is fully paid. Upon the payment, however, of the first assessment of forty per cent of said stock the same shall be issued in the name of each shareholder as he shall have subscribed for the same, and retained

by the bank until the same is fully paid. There shall be issued to said stockholders a certificate certifying the number of shares of capital stock that said shareholder is entitled to upon a payment of the remaining sixty per cent of the par value of said stock, which certificate shall state in its face the amount paid on said stock, and shall be assignable and transferable in the same manner as herein provided for capital stock, and shall be signed by the president and cashier."

The plaintiff demanded the issuing of a new certificate to her, which the bank refused, on the ground that the certificate which she held was spurious and void. The trial court decided against the plaintiff and she appealed.

Gilliam & Gilliam, for the plaintiff.

John L. Bridgers, for the defendant.

**218** WALKER, J. It appears in this case that the bank was fully authorized by its charter to issue the certificate of stock in question, and that, so far as the face of the certificate shows, it was issued in accordance with the provisions of the charter and the by-laws and regulations. The plaintiff loaned the money in the faith and confidence that the certificate of stock which had all the appearances of being genuine would constitute a valid and unimpeachable security in her hands for the money borrowed **219** by Mehegan, and we think that, upon well-established principles, she had the right to so regard it, and that the bank must pay to her the value of the stock not exceeding the amount of the debt, although it was in fact issued without the authority and contrary to the bank's instructions and in fraud of its rights.

The president and secretary signed several blank certificates and they were then left with the cashier, Mehegan, to be filled out in the name of the purchaser of the stock when called for by them.

The fact that they were signed by the president gave Mehegan, the cashier, the power to commit the fraud, but the opportunity to issue the spurious certificate was afforded by the negligent act of the corporation in leaving the blank certificates with Mehegan, who thereby acquired full control over them and the bank has thus become the author of the fraud and the victim of its own misplaced confidence. But should the plaintiff, an innocent holder, be caused to suffer for what the bank itself made it possible for him, Mehegan, to do? We



think not. The decision of the case must turn upon the application of a simple and just principle of the law to its facts.

"Whenever one of the two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it": *Lickbarrow v. Mason*, 2 Term Rep. 70.

It is well said by Lord Holt in *Hearn v. Nichols*, 1 Salk. 289, "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

"Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposed a confidence, or by his negligent conduct made it possible for the <sup>220</sup> loss to occur, must bear the loss": *Wilmington etc. R. R. Co. v. Kitchin*, 91 N. C. 39.

The principle has a striking illustration in the case of agency and has been extended to the acts of corporations, as we will presently see. "The rule has been established and may now also be stated as an indisputable principle that a corporation is responsible for the acts and negligence of its agents while engaged in the business of the agency, to the same extent and under the same circumstances that a natural person is chargeable with the acts and negligence of his agent, and 'There can be no doubt,' says Lord Chancellor Cranworth in *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 86, 87, 'that if the agents employed conduct themselves fraudulently so that if they had been acting for private employers the person for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation': *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 50.

There is no good reason for holding that this bank is not legally responsible for the fraudulent acts of the cashier Mehegan upon the ground that at the time he delivered the certificate to the plaintiff he was not in the performance of his master's business, but was acting for and in behalf of himself and outside the scope of his agency. This would be true as to all fraudulent acts and as to all acts done not strictly within the line of duty. The correct principle is that it will be quite sufficient to charge the employer with the liability, if all the acts of the employé are done within the apparent, though not real, scope of his agency.

In the case of *Western Maryland R. R. Co. v. Franklin Bank*, 60 Md. 36, where the question is fully discussed, the court uses this language: "It may be conceded, and was doubtless the case, that the agent had no authority in fact to issue such certificate; he had no real authority as between himself and his principal, or <sup>221</sup> other parties conusant of the facts, for doing the particular acts complained of, but the company by its own act and, as it turned out, misplaced confidence, placed the agent in the position to do, and procure to be done, that class of acts to which the particular act in question belongs; and in such case where the particular act in question is done in the name of and apparently in behalf of the principal, the latter must be answerable to innocent parties for the manner in which the agent has conducted himself in doing the business confided to him. Upon no other principle could the public venture to deal with an agent. In such case the apparent authority must stand as and for real authority." And again: "Where he issued such a certificate and delivered it to a third party, who acted without knowledge and in good faith, paying value for it, such party had the right to act upon the presumption that the representations of such certificates were truthful, and not false and fraudulent. Having confided to him the said trust of executing the business, the agent was held out to the public as competent, faithful and worthy of confidence; and though he deceived both his principal and the public, by forging and issuing false certificates, it is but reasonable that the principal, who placed him in the position to perpetrate the wrong should bear the loss."

But a decision was made upon substantially the same facts that we have in this case in favor of the holder of such a certificate in the case of *Titus v. Great Western etc. Road Co.*, 61 N. Y. 237, in which it was said: "Where the treasurer of a corporation upon the faith and pledge as collateral of spurious certificates, drawn up and executed in the form and manner prescribed by the by-laws (signature of the president having been negligently affixed), purporting on its face to be of stock owned by the treasurer, obtained a loan of one acting in good faith and in ignorance of the fraud, there being nothing upon the face of the certificate to notify the lender of any defect in the <sup>222</sup> title, the corporation is liable to the holder for the value of the stock, if the stock of the company had been issued up to the full limit fixed by the charter."

The case of *Titus v. Great Western etc. Road Co.*, 61 N. Y. 237, has been cited with approval in many courts in this country and the principles therein stated and applied meet with our unqualified approval as being those most consonant with reason and justice, and we do not see why it should not be decisive of this case. Among the many cases sustaining the principle of that decision we cite the following: *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Bridgeport Bank v. New York etc. R. R. Co.*, 30 Conn. 231; *Allen v. South Boston R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185, 22 N. E. 917; *Craft v. South Boston*, 150 Mass. 207, 22 N. E. 920; *Fifth Avenue Bank v. Forty-Second Street etc. Ferry Co.*, 137 N. Y. 321, 33 Am. St. Rep. 712, 33 N. E. 378; *People's Bank v. Kurtz*, 99 Pa. St. 349, 44 Am. Rep. 112; *Manhattan Beach Co. v. Harned*, 27 Fed. 486; *Cincinnati etc. R. R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 47 N. E. 249; *Clark on Corporations*, 438; *Mechem on Agency*, sec. 717.

We do not think there was anything in the face of the certificate to cause the plaintiff to suspect any fraud when she took it as collateral security for the loan to Mehegan. The mere fact that it was issued in the name of Mehegan, we have seen, was not sufficient for this purpose, and the requirement that it should be transferable on the books of the bank cannot in our opinion, have any such effect. As the principle governing in such cases is so clearly and forcibly stated in the case of *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, we quote at length from that decision: "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title. But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition <sup>223</sup> over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power. . . . It was only necessary to

a valid transfer as between the parties, that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignment and power has been repeatedly shown and sanctioned in cases which have come before our courts. . . . It has also been settled by repeated adjudications that, as between the parties, the delivery of the certificate with assignment and power indorsed passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the character or by-laws of the corporation the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections. . . .

“By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a bona fide purchaser. But, in this respect, he is in a condition analogous to that of **224** the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have no action against the corporation for allowing such a transfer in violation of his rights. He also takes the risk of collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete.

The holder of such a certificate and power possesses all the external indicia of title to stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities latent or otherwise, of third parties; but apparently, the legal title and the means of transferring such title in the most effectual manner. Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy toward persons who, in reliance upon those documents, have



in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title and claims as against them that he could not be deprived of his property without his consent, cannot he be truly answered that by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock he, in fact 'substituted his trust in the honesty of his brokers for the control which the law gave him over his own property,' and that the consequence of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money." See, also, *Loring v. Salisbury Mills*, 125 Mass. 150; *Leyson* <sup>225</sup> v. *Davis*, 17 Mont. 220, 42 Pac. 775; *Stone v. Hackett*, 12 Gray (Mass.), 231.

The text-writers are equally explicit in stating the doctrine. Morawetz on Private Corporations, section 185, says: "By general mercantile usage, shares in a corporation are assignable by indorsement and delivery of the certificate issued to the owner as evidence of his rights. It is well settled that, after a certificate for shares has been indorsed by the holder, with an assignment and power of attorney to execute a transfer upon the stock-books the name of the transferee and attorney being left blank, the certificate thus indorsed may be passed from hand to hand, and the last holder will be entitled to fill up the assignment and power of attorney, and complete the transfer by entry upon the books of the company. Stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market, the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be devised to assure the purchaser that he can buy with safety. He is told under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation in person or by

attorney, when the certificates are surrendered but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificate, regularly assigned with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the **226** holder that the corporation will not transfer the stock to any one not in possession of the certificate."

It follows, therefore, from the application of these principles, which are sustained by the highest authority, that the plaintiff was not notified in any way by the certificate itself that it had not been regularly issued; nor was there anything on its face calculated to arouse suspicion or inquiry and to put her on her guard. She was therefore, as between the bank and herself, the bona fide holder for value of the certificate with an unimpeachable title thereto, and if the certificate was not an overissue of stock, she is entitled to a transfer of it on the books of the bank and to a new certificate, and if the stock of the bank has been issued to the full limit authorized at the time, which appears to be the case from the facts agreed, she is entitled to recover its value of the defendant: *Bank v. Lanier*, 11 Wall. 369.

The defendants' counsel in his argument before us relied on the case of *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. Rep. 345. That case is quite different from ours in that the cashier agreed to give the plaintiff in that suit a certificate of stock which he alleged had been issued to himself, whereas he deposited with the plaintiff one in her own name, and the court attached great importance to this fact, and held that it was notice to her, and rather intimated that if the stock had been issued in the cashier's name the decision would have been the other way. The defendants' counsel also relied on the case of *Farrington v. South Boston R. R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109, but, upon examination of the facts of that case, we find that they are substantially the same as those in the case of *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. Rep. 345. We think that those cases can easily be distinguished from the one at bar, but if they cannot be, we would refuse to follow them, as we believe that the principles we have laid down as those which should control the decision of this case are perfectly sound and in full accord **227** with reason and right. We are of the opinion that the adoption of any other principle as applicable to such a case

would seriously impair the integrity of business transactions, and by destroying public confidence in such securities would prevent the free and untrammelled dealing in stock certificates and other paper of a like kind, which is so essential to the maintenance of their value and usefulness and to the success of many important and legitimate business enterprises. The effect of a contrary rule would indeed be very baneful and far-reaching. It is better to stand by the old and familiar principle, and place the loss upon the one whose negligent, though perhaps innocent act brought it about.

The judgment of the court below is reversed and judgment will be entered in that court for the plaintiff in accordance with the facts agreed upon by the parties and in conformity with the principles herein set forth.

Per Curiam. Judgment reversed.

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*The Conduct of a Bank Cashier* is governed by the ordinary rules of agency: See *Taylor v. Commercial Bank*, 174 N. Y. 181, ante, p. 564, 66 N. E. 726; *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438, and cases cited in the cross-reference note thereto.

*Fraudulent and Overissued Stock* is the subject of a monographic note to *First Avenue Land Co. v. Parker*, 87 Am. St. Rep. 847-860. If the secretary of a corporation makes out in due and regular form a certificate of stock purporting to be signed by the president and treasurer, and countersigned by the secretary, and to which the corporate seal is affixed, and the names of the other officers are forged and the issuing of the certificate is unauthorized, the corporation is answerable to a bona fide holder of such certificate: *Fifth Avenue Bank v. Forty-second St. etc. Ry. Co.*, 137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378. See, also, *Allen v. South Boston R. R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185, 22 N. E. 917; *Appeal of Kesterback*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381; and compare *Farrington v. South Boston R. R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109.

## AUSTIN v. AUSTIN.

[132 N. C. 262, 43 S. E. 827.]

**ESTATE OF DECEDENT—Res Judicata.**—An Order Directing the Sale of Real Property of a decedent to pay specified debts is not conclusive of the existence and validity of those debts in favor of the administrator in a subsequent proceeding between him and the distributees of the estate for the settlement of his accounts. (p. 640.)

Action by the administrator of the estate of W. H. Austin. Judgment for the plaintiff; the defendant appealed.

Redwine & Stack, for the plaintiff.

Adams & Jerome, for the defendants.

**262** CONNOR, J. This was a special proceeding instituted by the plaintiff administrator against the defendants, distributees of his intestate, for the purpose of having his final account **263** audited and approved and a final settlement of the estate of his intestate. Upon a return of the summons, a portion of the defendants filed their answers in which they allege that certain items of credit in the account, for which the plaintiff claimed credit, represented cash retained by him upon notes alleged to be due to himself against his intestate for the security of which he claimed to hold mortgages upon the real estate of his intestate; that the said mortgages were invalid and void, without any consideration, and they demand that said credits be not allowed the plaintiff in his final account.

The plaintiff filed a reply to the answer denying the allegations in regard to the said items of credit, and by way of further reply allege that "there was a special proceeding instituted in the said county and state on the fifteenth day of February, 1897, for the purpose of obtaining an order to sell the land of the deceased, W. H. Austin, for the purpose of creating assets to pay the debts of the said deceased; that in the petition filed in said proceeding it was set forth that there were three mortgages on said land, it being the land covered by the mortgages in dispute or controversy before the court; that said mortgages or the notes secured thereby amounted to about seven hundred dollars, and the mortgages set out in the answer as being void are two of the mortgages referred to in the petition in said proceeding, as hereinbefore re-



ferred to; that in said special proceeding the defendants in this cause were the defendants in that proceeding and were legally made parties before the court; that the defendants contending in this cause, except the minor defendants, filed no answer, and the minor defendants, through and by their guardian ad litem, Iredell Hilliard, an attorney of this court, filed an answer admitting the allegations therein made; that the summons, petition, answer, orders and decrees filed in the special proceeding hereinbefore referred to are on file in the **264** office of the clerk of this court, and are hereby referred to and prayed to be taken as a part of the replication." The plaintiff pleads said record and proceeding as an estoppel, and says that the defendant should not again bring into litigation the validity of said mortgages or the notes secured thereby.

Upon the pleadings, the proceeding having been duly transferred to the superior court, issues were submitted to the jury upon and in respect to the matters set up by way of estoppel and were answered in the affirmative, and judgment was rendered that the defendants are estopped to set up the matters and things alleged in their answer in respect to the validity of said notes and mortgages given to secure the same, from which the defendants appealed.

Allegation 4 of the petition filed by the plaintiff administrator against the defendants, heirs at law of his intestate, for the purpose of obtaining license to sell the real estate to make assets, is in the following language: "That the personal property of the said W. H. Austin is of small value, and will not sell for more than one hundred or one hundred and fifty dollars, and will not be nearly sufficient to pay the debts of the intestate, and it will be, and is now, necessary to sell the real estate above described to make assets to pay the said debts, there being three mortgage debts on the land above described amounting to more than seven hundred dollars in addition to other debts not secured by mortgages." The two items referred to in the answer represent two notes and mortgages aggregating six hundred and fifty-seven dollars and seven cents.

We think that there was error in the court in holding that, upon the record and findings by the jury, the defendants were estopped to deny the validity of the notes and mortgages claimed by the plaintiff against his intestate. The case of *Latta v. Russ*, 53 N. C. 111, would seem to be decisive of the question. There, the contention was made, as it is here, that

the decree by which the land was sold, and to which the devisees were <sup>265</sup> parties, concluded them as to the amount of the debts, etc. The court, Pearson, C. J., says: "We do not concur with his honor in the view taken by him of the question reserved in respect to the effect of the decree giving the administratrix license to sell the lands. The decree was an adjudication that it was necessary to sell, and is conclusive in favor of the title acquired by the purchaser, but it is not conclusive of the question of debt or no debt, as against or in favor of creditors, or as against or in favor of heirs": *Finger v. Finger*, 64 N. C. 183. It will be observed that in *Latta v. Russ*, 53 N. C. 111, it is stated that "the administratrix filed her petition setting forth that she had exhausted the personal estate and that there remained a certain amount of debts [stating them] unpaid, etc." In this case the averment is that the "debts are three mortgage debts on the land above described amounting to more than seven hundred dollars in addition to other debts not secured by mortgage."

It would therefore seem that the allegation is much more definite in the first than the present case. In this case, no answer was filed by the adult defendants. The infants answered by their guardian ad litem, admitting the allegations. The plaintiff contends that the proceeding in *Latta v. Russ*, 53 N. C. 111, was conducted under the statute in force prior to 1868, the date at which our judicial system was changed. The case is not an authority which should be followed by us. Revised Code, chapter 46, section 45 et seq., prescribes the procedure by which the personal representative may obtain license to sell real estate to make assets. Among other things he is required in the petition to set forth "the amount of the debts as nearly as they can be ascertained." The same requirement is made by section 1437 of the code. The proceedings subsequent to the filing of the petition are substantially the same, prior to and since 1868. Jurisdiction is vested in different courts, but the same defenses <sup>266</sup> are open to the heirs under both systems of procedure. The court of pleas and quarter sessions had no equitable powers, except when expressly conferred by statute: *Thompson v. Cox*, 53 N. C. 311; neither has the clerk "acting as and for the court" any jurisdiction to administer equitable relief, but defenses may be interposed raising issues, the ultimate determination of which in the superior court upon the

cause being transferred, will involve such rights and remedies: *Wood v. Skinner*, 79 N. C. 92.

In *McBryde v. Patterson*, 73 N. C. 478, *Pearson, C. J.*, discussing the question says: "But the case was properly instituted before him [the clerk] in the first instance by the petition for partition, and the question of legal and equitable grounds of relief raised by the subsequent pleadings, which questions he had no power to dispose of, did not authorize a judgment dismissing the case: *Helms v. Austin*, 116 N. C. 751, 21 S. E. 556; *Vance v. Vance*, 118 N. C. 864, 24 S. E. 768; *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518. While the defendants in the special proceeding may file an answer putting in issue the existence of valid debts, and thereby raise issues to be tried by the court in term, we do not think that they were required to do so, or that their failure to do so estopped them from setting up the contention in their answer herein. The only purpose of the proceeding was to ascertain whether it was necessary in the then condition of the estate to sell the real estate for the purpose of making assets to pay debts. The estate was not then in a condition for final settlement. We think that the principle upon which *Tyler v. Capehart*, 125 N. C. 64, 34 S. E. 108, is decided, is applicable to the facts in this case. A judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them, but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiffs have joined, but which in fact are neither joined nor embraced <sup>267</sup> in the pleadings"—citing *Williams v. Clouse*, 91 N. C. 322; *Gregory v. Hobbs*, 93 N. C. 1; *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248. In the last-mentioned case the court say: "The judgment can be conclusive only so far as it affects rights presented to the court and passed upon."

We think that the judgment should be reversed and that the superior court, in term, should submit appropriate issues raised by the answer to the jury. As the cause is now in the court, we think that it should retain jurisdiction and dispose of it. There is error.

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*The General Rule of Res Judicata* is stated in *White v. Ladd*, 41 Or. 324, 68 Pac. 731, 93 Am. St. Rep. 732, and cases cited in the cross-reference note thereto. Its application to the decrees of probate courts ordering the sale or encumbrance of the decedent's estate is considered in *Grubb v. Galloway*, 203 Pa. St. 236, 52 Atl. 176, 93 Am. St. Rep. 764, and cases cited in the cross-reference note thereto.

## McNEILL v. DURHAM AND CHARLOTTE RAILROAD COMPANY.

[132 N. C. 510, 44 S. E. 34.]

**RAILWAY COMPANIES.**—Where There is no Lawful Contract of Passage, the only right which a person on a train can claim against a railway corporation is that it shall not willfully or wantonly injure him. (p. 642.)

**RAILWAY CORPORATION—Liability to One Riding on a Pass Prohibited by Statute.**—An editor of a newspaper riding on a free pass, the issuing of which is forbidden by statute, cannot recover of the railway corporation for injuries to him due to the negligence of its employés. He and the corporation are in *pari delicto*, and the courts will leave them to settle their own controversy over damages for the breach of a contract forbidden by law. (p. 644.)

Action against a railway company. Judgment for the plaintiff; the defendant appealed.

U. L. Spence, W. J. Adams and Douglass & Simms, for the plaintiff.

Guthrie & Guthrie, Murchison & Johnson and H. F. Seawell, for the defendant.

**510** CLARK, C. J. This is an action of tort arising out of contract for personal injuries alleged to have been received by the plaintiff April 6, 1900, by negligence of the defendant while travelling on its road. The complaint avers that the plaintiff was a passenger on said railroad under a contract by it to carry the plaintiff for a valuable consideration. The defendant in its answer, among other things, avers that the plaintiff was a "trespasser on its train having tendered to defendant no ticket, money or compensation whatever for its fare, only a free pass which had expired January 1st previously by its own limitation," and which further had on its back a stipulation exempting the company from liability under all circumstances for injury to his person or loss or damage to his baggage.

**511** The plaintiff testified that he was "editor of the 'Carthage Blade,' a newspaper published in Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper as the consideration for the pass. I did publish the time-table and the defendant agreed to continue the contract and renew the pass for 1900." It is true he said he told the conductor he would pay the fare, but upon his making



the above statement the conductor accepted him as a free passenger.

Upon this evidence the motion for judgment as of nonsuit should have been granted. There is no lawful contract of passage, and the only right the plaintiff could claim against the defendant is that the defendant should not willfully and wantonly injure him: *Cook v. Southern Ry. Co.*, 128 N. C. 333, 38 S. E. 925. The general assembly (Laws 1891, c. 320, sec. 4), provided that "If any common carrier subject to the provisions of this act shall directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantial similar circumstances and condition, such common carrier shall be deemed guilty of unjust discrimination." Section 25 of said chapter contains the exceptions which permit handling free and at reduced rates property of the United States, state or municipal governments, or for charitable purposes, or to or from fairs and at exhibits thereat, and permits "the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the free transportation of persons traveling in the interest of <sup>512</sup> orphan asylums or any department thereof, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangement with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers or employés."

These exceptions are very liberal, but they do not embrace newspaper editors. Subject to the liberal exceptions just re-

cited, the general assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine "not less than one thousand dollars and not exceeding five thousand dollars" for each offense. Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit, that for the year previous he had advertised the schedule of the defendant company in his paper and had received therefor a free pass over its line for the previous year, and that this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others, but let it be what it may, it could not amount exactly "neither more nor less," to the value of a free pass to travel ad libitum, an unstipulated number of miles over the defendant's road. Besides it was an illegal <sup>513</sup> discrimination to sell the plaintiff transportation on credit and not payable in money.

This statute was before this court, and the clear meaning of the statute and the duty of the court to enforce the public policy indicated by its unequivocal terms were stated in an exhaustive and able opinion by Mr. Justice Montgomery in *State v. Southern Ry. Co.*, 122 N. C. 1052, 30 S. E. 133. In the concurring opinion of Mr. Justice Douglas in that case it was stated that the number of free passes issued in this state per year was understood to be over one hundred thousand, and after deducting the free passes issued in the cases allowed by the act over two hundred and fifty thousand dollars of transportation was given away each year, mostly to the classes best able to pay, and that this quarter of a million dollars was per force added to the fares of those who paid their way. This was to show the public policy which required that such discriminations should be forbidden.

Sections 4 and 25 of the act of 1891, above quoted, were copied from the act of congress forbidding such discriminations, and the rulings of the interstate commerce commission and of the federal courts thereon have been to the same effect as our own, many of those decisions being cited by Justice Montgomery in *State v. Southern Ry. Co.*, 122 N. C. 1063-1067, 30 S. E. 133. At page 1060, 122 N. C., and page 135, 30 S. E., it is well said: "The thing which was denounced by the statute and for which the defendant is indicted is not the act of giving the free pass, the mere handing to the passenger

the piece of paper on which was written the privilege of riding free, but the actual transporting the favored passenger without charge or the payment of fare. The law would be violated when no pass was actually issued, if the passenger was carried free. The favored passenger might be known to the conductor, or be known to <sup>514</sup> him by preconcerted signs, or mileage-books distributed gratis, or sold at reduced rates, and in other ways."

The plaintiff knew that the defendant had no right to make a contract with him to transport him free an unlimited number of miles for an advertisement which in any aspect would not be the exact rate charged all other passengers. He knew that the statute denounced such attempted contract as unlawful and punishable with a fine "not less than one thousand dollars, nor more than five thousand dollars." While the plaintiff was not himself made indictable (as in some states) he knew that the contract was unlawful, and he cannot now come into a court of justice and ask that the court shall give him compensation for damages sustained by the negligent breach of the contract of safe carriage. That presupposes a lawful contract, and he knew that this was an unlawful contract. He and the defendant are in *pari delicto* and the court will leave the parties to settle their own controversy over damages for breach of a contract forbidden by law.

In *Cook v. Southern Ry. Co.*, 128 N. C. 333, 30 S. E. 925, a tramp was stealing a ride. He was on the train unlawfully. In *Pierce v. North Carolina R. R. Co.*, 124 N. C. 83, 32 S. E. 399, a boy had jumped on a switching train and was riding thereon contrary to the town ordinance. The court held that the company was liable in such cases only for any willful or wanton injury inflicted by the employés of the company. Here, the plaintiff was on the train illegally, and against a prohibition more severe than the violation of a town ordinance against the boy or the stealing of a ride by a tramp. To same purport, *Richmond etc. R. R. Co. v. Burnseed*, 70 Miss. 437, 12 South. 958, 35 Am. St. Rep. 656, and notes; *Hendryx v. Railroad Co.*, 45 Kan. 379, 25 Pac. 893, and cases cited. The plaintiff is an educated, reputable gentleman, a member of an honorable profession, but being on the cars illegally, seeking free transportation or at least discrimination in rates, contrary to the prohibition of the statute, his <sup>515</sup> rights, as against the company are the same as those of others who were also riding

contrary to law. He neither shows, nor avers, willful, wanton or malicious injury, and cannot recover.

In *State v. Southern Ry. Co.*, 122 N. C. 1052, 30 S. E. 133, the defendant set up the plea of ignorance of the law, but the court said every one was fixed with knowledge of the law. The plaintiff has had the additional advantage of the notice given by the construction of the statute in that case. In a subsequent case, *State v. Southern Ry. Co.*, 125 N. C. 666, 34 S. E. 527, the court repeated that free transportation (or reduced rates) except in cases allowed by the statute "would be an undue preference, forbidden by the statute, equally whether it was given upon a free pass from an official, or by a verbal order, or upon a ticket or mileage-book not in truth paid for, but donated by the company. It is the fact of discrimination and not the method by which it is done, which constitutes the offense." Subsequent to these decisions, the general assembly re-enacted these sections as sections 13 and 22, chapter 164 of the Laws of 1899, with no substantial change, though some other sections were repealed.

The constitutions of eleven states—Alabama, Arkansas, California, Florida, Kentucky, Mississippi, Missouri, New York, Pennsylvania, Washington and Virginia—prohibit the issuing of free passes or giving reduced rates to any member of the legislature or other office-holder whatever, and some of these constitutions, like the federal statute and our statute and the statutes of yet other states, as Colorado, Massachusetts, North Dakota, Wisconsin, and others, forbid the issuing of free passes or reduced rates to anyone, whether office-holder or not, with exceptions similar to those enumerated in our statute, above set out. Indeed, the constitutions of four states—New York, Missouri, California and the recently adopted constitution of Virginia—make the acceptance by <sup>516</sup> any office-holder whatever of a free pass from a railroad or telegraph company, or other discrimination in his favor, a forfeiture of office. This recital will serve to show the importance and general acceptance of the public policy, of equality in treatment by quasi public corporations whose infringement our statute punishes with a fine "not exceeding five thousand dollars" and whose observance it is the duty of all courts to enforce. The denunciation of the statute is directed against discrimination in the exercise of a quasi public function which public policy demands shall be discharged with absolute impartiality and



equality—"with equal rights to all and special privileges to none."

We were cited to many authorities holding ineffectual stipulations upon the back of free passes, exempting the common carrier from liability for injuries sustained by the holder thereof. These authorities are conflicting (4 Elliott on Railroads, section 1608), and can be considered only when the pass is issued in one of the cases permitted by our statute. It has no application to a case like this where the contract of free carriage is illegal and the parties are in *pari delicto*.

This is a stronger case for the defendant than *Turner v. North Carolina R. R. Co.*, 63 N. C. 522, in which a soldier contracted with a railroad company for transportation to Johnston's Army to serve against the United States and was injured en route by negligence of the company, and it was held that he could not recover damages, Reade, J., saying that the contract of carriage being illegal, the parties "were in *pari delicto*," and the court "would consult its dignity, and not interfere in their dispute." To same purport, *Martin v. Wallace*, 40 Ga. 52; *Redd v. Muscogee R. R. Co.*, 48 Ga. 102; *Muscogee R. R. Co. v. Redd*, 54 Ga. 33.

This is the first case in which the illegal discrimination is set up by the common carrier, but it so happens that by the lapse of time it is now protected from indictment by the 517 statute of limitations. In refusing to grant judgment as of nonsuit, there was error.

DOUGLAS, J., dissenting. I am inclined to think that the plea in *pari delicto*, applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the defendant.

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A *Common Carrier* of passengers must exercise the highest degree of care for their safety: *Le Blanc v. Sweet*, 107 La. 355, 31 South. 766, 90 Am. St. Rep. 303, and cases cited in the cross-reference note thereto. As to who are passengers within this rule, see the monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75-104. Mere nonpayment of fare will not deprive a traveler of his right of action for the negligence of the carrier: *Russell v. Pittsburgh etc. Ry. Co.*, 157 Ind. 305, 87 Am. St. Rep. 214, 61 N. E. 678. And a railroad company is liable for injuries to a trespasser on its train inflicted by reason of the willful or wanton conduct of employes, or by reason of such gross negligence as amounts to willfulness: *Illinois Cent. R. R. Co. v. Leiner*, 202 Ill. 624, ante, p. 266, 67 N. E. 398. But see *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119.

## MENZEL v. HINTON.

[132 N. C. 660, 44 S. E. 385.]

**MORTGAGE WITH POWER OF SALE—Construction of Code Specifying Time for Foreclosure of.**—A provision of the code specifying the time within which an action may be commenced for the foreclosure of a mortgage or deed of trust for creditors, with a power of sale, does not fix or limit the time within which a mortgagee may exercise his power of sale. (pp. 647, 648.)

**STATUTES OF LIMITATION Operate upon the Remedy in the Courts,** but do not destroy the debt. (p. 651.)

**MORTGAGE WITH POWER OF SALE—Statute of Limitations.**—The power of sale given in a mortgage may be exercised after the debt secured thereby has been barred by the statute of limitations. (p. 652.)

G. W. Ward and W. M. Bond, for the plaintiffs.

E. F. Aydlett, for the defendants.

<sup>660</sup> CONNOR, J. The Code, section 152 (3), provides that the period prescribed for the commencement of "an action for the foreclosure of a mortgage or deed of trust for creditors with a power of sale of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale becomes absolute, or within ten years after the last payment on the same." We are unable to discover in this <sup>661</sup> language any period of time fixed within which the mortgagee is required to execute the power of sale. It will be observed that this section prescribed the time for bringing an action (1) for the foreclosure of a mortgage, (2) or deed in trust for creditors with power of sale. The instrument executed by Foreman to Hinton is a mortgage containing a power of sale and is not within the language of the statute. It was not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power; hence no time is fixed by the statute within which he must execute the power. The word "action" in the paragraph evidently has reference to the action for foreclosure and not to the execution of the power of sale, which requires no action. To construe the statute otherwise would be to write into it language which we do not find there.

It must be conceded that the language used by this court in *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78, would seem to sustain the contention of the plaintiff. In that case, the bond

for the security of which the mortgage was given was barred by the statute of limitations, the last payment thereon having been made more than ten years before the threatened execution of the power. The mortgagor applied for an injunction to restrain the sale by the mortgagee under the power, which was refused. The only question presented in that case was whether the mortgagor had any equity upon which to base his application for the interference of the court. The case is correctly decided. If the execution of the power was not barred by the statute, he was of course not entitled to an injunction; if it was barred and his right to execute the power at an end, the legal title would not pass by the sale. It will be observed that this case was decided prior to the passage of the act of 1893, chapter 6, permitting action to be brought to remove a cloud from title. Clark, J., in that case says: "The court will therefore not <sup>662</sup> interpose by an injunction merely to prevent a cloud upon the title."

Hutaff v. Adrian, 112 N. C. 259, 17 S. E. 78, is cited in Smith v. Parker, 131 N. C. 470, 42 S. E. 910. No question was involved in that case regarding the statute of limitations, nor was it cited for that purpose. Conceding that an action in personam upon the note held by Hinton against Overton was barred by the statute, it would not affect the decision of this cause. It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it: Capehart v. Dettrick, 91 N. C. 344. This, because the bar of the statute affects only the remedy and not the right: Parker v. Grant, 91 N. C. 338; Rouss v. Ditmore, 122 N. C. 775, 30 S. E. 335, 19 Am. & Eng. Ency. of Law, 146; Sturges v. Crowningshield, 4 Wheat. 206. Hence it is that in an action upon a debt barred by the statute, for the payment of which a "now and continuing promise" is relied upon, the "cause of action" is the original debt, and the new promise is relied upon to repel the bar: Falls v. Sherrill, 19 N. C. 372. In Kull v. Farmer, 78 N. C. 339, the distinction between an action on a debt barred by the statute and one discharged in bankruptcy is pointed out; in the latter "the cause of action" is the new promise, the old debt being a consideration to support the promise. The reason for the distinction is obvious. Prior to the adoption of our code, there was no statute of limitations in regard to sealed instruments, bonds and mortgages. There was a presumption of payment or satisfaction after the lapse of ten years: Rev. Code, c. 65, sec. 18.

This presumption affected the right as distinguished from the remedy: *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Long v. Clegg*, 94 N. C. 764. Of course if the debt is paid or satisfied either by actual payment or by presumption of law, the mortgage which is incidental to the debt is likewise discharged, and, in equity, the purpose for which the legal title was conveyed <sup>663</sup> being accomplished, would be treated as discharged and the mortgagor as the owner of the land: *Ray v. Pearce*, 84 N. C. 485; *Edwards v. Tipton*, 85 N. C. 480; *Simmons v. Ballard*, 102 N. C. 109, 9 S. E. 495. That such is not the law under our statute of limitations is settled by the uniform and unanimous decisions of this court.

In *Long v. Miller*, 93 N. C. 227 (233), Smith, C. J., said: "As to the enforcement of the mortgage . . . there is no statutory bar. While the personal action is barred, the action to enforce the mortgage is not, as was decided in *Capehart v. Detrick*, 91 N. C. 344 " *I James v. Gaither*, 93 N. C. 364.

In *Arrington v. Rowland*, 97 N. C. 131, 1 S. E. 557, Merri-  
mon, J., said: "If the debt secured by the deed of trust had been independent of and apart from the deed, as contended by the defendants, the plaintiffs would have the right to have the trust executed. The court would not, in that case, deny the plaintiffs this remedy, simply on the ground that the debt intended to be secured is barred by the statute of limitations."

Clark, J., in *Taylor v. Hunt*, 118 N. C. 172, 24 S. E. 359, said: "The security, when not barred, is enforceable though action on the debt is barred."

Smith, C. J., in *Overman v. Jackson*, 104 N. C. 4 (8), 10 S. E. 87, said: "Equally without support is the suggestion that if the debt is barred so must the mortgage to secure it be. These are essentially distinct as affected by the statute of limitations, as is held in *Capehart v. Detrick*, 91 N. C. 344, and *Long v. Miller*, 93 N. C. 227."

In *Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696, Mac-  
Rae, J., said: "Indeed, though an action upon the note was barred by the statute, the lien created by the mortgage is not impaired in consequence of the running of the statute of limitations on the debt."

In *Hedrick v. Byerly*, 119 N. C. 420 (422), 25 S. E. 1020, Montgomery, <sup>664</sup> J., said: "The statute of limitations defeats the remedy when the note is sued upon, but it does not discharge the debt, and although the debt may be barred by the statute, yet the mortgage by which the debt is secured, if itself not



barred, may be foreclosed by the mortgagee in proceedings for that purpose."

Thus we see it uniformly and without dissent held by this court that the right to subject the mortgaged land to the payment of the debt is not affected by the statutory bar of the debt. This is in accordance with the current of authority in other courts.

The question is clearly set forth and discussed in the case of *Goldfrank v. Young*, 64 Tex. 432, in which Stayton, A. J., said: "In reference to the operation of the statute of limitations in any matter in which the recovery of money is sought, the statute itself limits it to 'actions or suits in courts,' and it provided within what time 'actions or suits' in the different classes of cases may be brought, but it does not attempt to determine within what period anyone must enforce a right which the debtor has placed it in the power of the creditor to enforce otherwise than by an 'action or suit in court.' . . . The declaration that persons must institute 'suits or actions in courts' within a fixed period to enforce their claims, which can be enforced only in that manner, is not equivalent to declaring that a creditor who has been given by contract a right and means by which he may enforce his claims otherwise than through the courts shall not enforce it after the time at which he might institute an action or suit, without subjecting himself to the bar which would be urged by a plea of limitation. It is not always true that rights which cannot be enforced through the courts are valueless, nor that contracts which the courts cannot enforce are invalid." In this case the supreme court of Texas held, "that the statute of limitation which applied to a money <sup>665</sup> demand operates upon the remedy when its enforcement is sought by 'suits or actions' in courts. It does not deprive the creditor of a remedy when he had provided by contract, to enforce through a trust deed the payment of his claim."

This case was approved in *Fievel v. Zuber*, 67 Tex. 275, 3 S. W. 273, the court saying: "The statute does not say that no debt shall be collected, but that no action shall be brought. Nor does it provide that the debt shall be extinguished. Any statutes of limitation worded like ours are generally held to operate solely upon the remedy in the courts and not to destroy the debt": *Tombler v. Palestine Ice Co.*, 17 Tex. Civ. App. 596, 43 S. W. 896. To the same effect is *Hartrauft's Estate*, 153 Pa. St. 540, 34 Am. St. Rep. 717, 26 Atl. 104; *Slaymaker v. Wilson*, 1 Penr. & W. 216; *Gardner v. Terry*, 99 Mo. 523,

12 S. W. 888. In *Grant v. Burr*, 54 Cal. 298, it is said: "The expiration of the statute time for bringing an action to recover a debt, or to enforce any personal obligation, does not operate as an extinguishment or payment; therefor, where the legal title to land has been conveyed to a trustee to secure a debt, the title and power of the trustee is not affected by the expiration of the period prescribed to bar the debt, and a court of equity will not interfere to enjoin a sale under the deed. The statute of limitations is to be employed as a shield and not as a sword; as a means of defense and not as a weapon of attack."

In *Hayes v. Frey*, 54 Wis. 503, 11 N. W. 695, it is held: "The validity of a sale under a power in a mortgage is not affected by the fact that the statute of limitations had run upon the note secured by the mortgage": *Jones on Mortgages*, sec. 1204; *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270.

"Except when the statute expressly or by fair inference destroys the remedy upon the mortgage at the same time that the remedy is destroyed as to the debt, it may be enforced after the statute has run upon the debt, unless the same statutory <sup>666</sup> period is applicable to both": 2 *Wood on Limitations*, sec. 223, p. 549; *Hardin v. Boyd*, 113 U. S. 765, 5 Sup. Ct. Rep. 771.

"The maker of a trust deed or mortgage with a power of sale cannot enjoin a sale thereunder on the ground that the debt is barred by the statute of limitations; and this is held to be true even in those states where the general rule is that the bar of the debts bars the right to institute suit to foreclose. . . . For similar reasons when the trustee or mortgagee has sold the mortgaged property under an express power of sale contained in the mortgage or trust deed, the sale cannot be set aside on the ground that the debt and the instrument securing it were barred at the time of the sale": 19 *Am. & Eng. Ency. of Law*, 2d ed., 178; *Minor's Institutes*, book 3, p. 366.

These authorities conclusively settle the proposition that the right to enforce the mortgage is not affected by the statutory bar of an action in personam upon the debt. As we have said, a mortgage containing a power of sale not being within the words of the statute, and therefore the execution of the power not being affected thereby, we can see no reason why the mortgagee may not execute the power at any time. The debt being in existence, unpaid, no court of equity would enjoin the execution of the power upon the theory that there was a presumption of payment of the debt. It is conceded that if it were

necessary for the mortgagee to bring an action to invoke the equitable aid of the court to foreclose his mortgage after the expiration of ten years from the last payment on the debt, the mortgagor being in possession, he would be barred because, in that event, he would abandon his power of sale and ask for the intervention of the court, which would be compelled to enforce the statutory bar.

The point upon which we rest our decision is, that as the mortgagor has expressly put it in the power of the mortgagee to sell the land for the payment of the debt, and thereby relieved him of the necessity of bringing an action for that purpose, <sup>667</sup> his right is not affected by the statute of limitations, which applies only to actions brought for the enforcement of rights. The legislature may, if in its wisdom it should see fit, place the execution of the power of sale, in respect to the time within which it must be exercised, upon the same footing as actions to foreclose a mortgage with power of sale; but we cannot, in the absence of any legislative declaration, make the law. It is ours simply to declare it.

This opinion does not overrule or question *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78, in respect to the point decided in that case, to wit, that the plaintiff was not entitled to injunctive relief. In so far as it is said that after the expiration of ten years the mortgage is dead, the right is destroyed we cannot concur.

The judgment of the court below is affirmed.

**Justice Douglas and Chief Justice Clark Dissented**, both placing their dissent chiefly on the ground that the question had been otherwise decided in *Hutaff v. Adrian* 112 N. C. 259, 17 S. E. 78, and *Smith v. Parker*, 131 N. C. 471, 42 S. E. 910, the chief justice, among other things, saying: "The basic reason of these decisions is this: A power of sale is no part of the conveyance, but it is merely a power of attorney to do the act which is equivalent to a power to waive judgment in an action, if not barred by payment or otherwise, on the bond and for foreclosure. A power of sale changes in no wise the characteristics and incidents of a mortgage: 2 *Pingree on Mortgages*, sec. 1313. When by lapse of time the bond and mortgage are both barred, or the debt has been paid, the power of sale falls and ceases to be of any validity. A party is entitled to take the benefit of the statute, just as he would of actual payment having been made, if he pleads it at the first opportunity. The statute is simply an irrebuttable presumption of payment, and, like payment, must be pleaded. If an action has been brought to

foreclose this mortgage after the lapse of ten years, the mortgagor could have pleaded the statute of limitations. Only his failure to do so would be a waiver. The absence of the mortgagor from the state suspended the running of the statute as to the action on the bond, but not as to the lien on the land: *Anderson v. Baxter*, 4 Or. 105.

“When there is a sale under the power of sale, there is no opportunity to plead either the statute or payment, and the mortgagor hence is entitled to do this when an action of ejectment is brought (as is held in the above cases) because this is his first and only opportunity to plead it as a defense. The action of ejectment not having been brought, the mortgagor is now proceeding, as authorized by chapter 6, Laws of 1893, to bring this action to remove a cloud upon title, in which equitable proceeding he can set up the fact that he would have pleaded the statute of limitations if the purchaser had brought an action of ejectment. This is the identical ground which would have authorized him to sustain an injunction to prevent the sale, had he so chosen. He has the election being in possession to do either, or to await an action of ejectment, provided he sets up the payment or statute of limitations at the first opportunity in proceedings pending in court.

“There is no statute of limitations against the execution of a power of sale, and none is needed. It is a mere power of attorney. When either payment or the statute of limitations can be and is set up to the debt and mortgage, the execution of the power of attorney is a nullity, for the debt and mortgage have lost their validity, provided the defense is pleaded at the first opportunity. This opportunity may be afforded by an action of ejectment brought by the purchaser, or it may be set up by the mortgagor himself, either in an action for an injunction before the sale, or in an action to remove cloud upon title after the sale, as in this case. The statute, chapter 6, Laws of 1893, does not compel an injunction to prevent a sale, but gives relief after sale, when, as here, the claimant does not bring his action of ejectment.

“The substantial matter is the debt and mortgage, and the mortgage is barred in this case by the lapse of time, and the statute has been pleaded at the first opportunity in a proceeding in court. The power of sale is outside of court, and there was no opportunity afforded to plead the statute to that proceeding, even if there were one. Here, the mortgage became barred February 19, 1895, being ten years from the last payment. The sale under the power of sale, May 4, 1899, had no efficacy if the purchaser had chosen to bring an action of ejectment and the defendant had pleaded the statute: *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78; *Smith v. Parker*, 131 N. C. 471, 42 S. E. 910; *Simmons v. Ballard*, 102 N. C. 109, 9 S. E. 495. Hence, doubtless, the purchaser did not move. The first proceeding actually in court, in which the statute could be pleaded, is



this to remove the cloud upon title. Upon the facts agreed, judgment should have been in favor of the plaintiffs.

"It is true that the mortgage is not necessarily barred when the debt is, but when the bar of the statute of limitations can be successfully pleaded to the mortgage, the power of sale (which is a mere power of attorney to dispense with the formality of an action and judgment of foreclosure) is barred because it has nothing to act upon. Powers of sale are not favorites of the law (*Mosby v. Hodge*, 76 N. C. 387), and it would be exceeding strange if when, by reason of the statute of limitations, an action cannot be maintained to foreclose the mortgage, a power of attorney to sell without formal decree of foreclosure should put vitality into a mortgage upon which a court is powerless to decree foreclosure."

The same question was presented to the same court in *Cone v. Hyatt*, 132 N. C. 810, 44 S. E. 678, where the majority expressed an opinion and the minority a dissent as in the principal case so far as the same question was involved. Upon this topic the prevailing opinion said, after referring to, and ruling upon, another question:

"This ruling is perhaps sufficient to dispose of this appeal, but if the statute had applied to the case presented, it could do so only by analogy—that is, by treating the proceeding taken out of court by the trustee in the execution of the power as substantially the same as a suit or action to foreclose the trust, and if this is done the analogy must be complete and the same principles which would apply to the suit or action should be extended throughout to the proceeding for the execution of the power. The argument advanced to show that the statute does apply to the execution of the power by the trustee must proceed upon the assumption that there is such an analogy, for it must be conceded, in view of so many decisions by this and other courts which establish the proposition, that the debt is not extinguished by the running of the statute, and the latter affects only the remedy. The argument cannot be sustained upon the idea that the debt is gone and there is nothing, therefore, to support or justify the execution of the power. This court has said that the statute of limitations is a statute of repose. It suspends the remedy, but does not cancel the debt: *Capehart v. Detrick*, 91 N. C. 351, 352.

"If this supposed analogy between a proceeding to foreclose a deed of trust by advertisement and sale and a suit in court for that purpose does exist and the principles which govern a suit in court, upon a cause of action which is barred, are applied to the facts of this case, we find that no attempt was ever made by the defendants to plead the statute before the sale or otherwise to obtain the benefit of it, and the case, therefore, must stand, if the analogy is carried out to its legitimate consequences, just as if a suit had been brought, judgment of foreclosure rendered and a sale

made and confirmed, so that the matter is finally closed and at an end, without the interposition in due time of any plea of the statute. Can it be said that a party under such circumstances may avail himself of the statute? While a party must be diligent in prosecuting his action, in order to enforce his rights or else be barred when sufficient time has elapsed for that purpose after the cause of action accrued, the other party who seeks to avail himself of this lapse of time must be equally diligent in bringing forward his plea or he will be deemed to have waived it. We do not mean to imply that there is any way known to the law by which a mortgagor or trustor can avail himself of the statute as against a mortgagee or trustee, who is attempting to execute the power under the deed of trust by what have been called proceedings in pais, instead of resorting to a suit in court. Indeed, such a right in the mortgagor or trustor to benefit by the statute under such circumstances has been held not to exist. In *Grant v. Burr*, 54 Cal. 298, the court decides that the running of the statute for the full period of limitation 'does not operate as an extinguishment or payment,' and when the legal title to land has been conveyed to a trustee to secure a debt, the power and title of the trustee are not affected by the expiration of the time prescribed to bar the debt, and a court of equity will not interpose to enjoin a sale under the deed. The statute of limitations is to be employed as a shield and not as a sword; as a weapon of defense, not a weapon of attack. In other words, the statute of limitations by the very language of our code is made the subject of a defensive plea only, and is required, therefore, to be specifically set up in that way in an action on the debt or deed of trust. 'The objection that the action was not commenced within the time limited can only be taken by answer': *Clark's Code*, 2d ed., sec. 138, and cases cited. It is never the proper basis of an action in which affirmative relief is sought: 19 Am. & Eng. Ency. of Law, 2d ed., p. 178; *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. Rep. 100. It is true a title to property may be acquired by adverse possession, but that is by express provision of the statute, and the statute is not then pleaded *eo nomine*, but the title or ownership is asserted or denied, as the case may be, and proof of a sufficient adverse possession may be offered to sustain the allegation or denial. The plea of the statute is not proper in such a case: *Manufacturing Co. v. Brooks*, 106 N. C. 107, 11 S. E. 456; *Cheatham v. Young*, 113 N. C. 161, 37 Am. St. Rep. 617, 18 S. E. 92.

"It has been suggested that the principle upon which such statutes are founded is the one taken from the civil law, by which a presumption of payment or release arises from the lapse of time. Mr. Wood in discussing this question says: 'Whatever may formerly have been thought to be the ground upon which these statutes are based, it is now quite generally conceded that their purpose

was, and is, to compel the settlement of claims within a reasonable period after their origin, and while the evidence upon which their enforcement or resistance rests is fresh in the minds of the parties or their witnesses, and that there is no presumption to be raised either as to payment or otherwise from the mere lapse of the statutory period more than would naturally arise as to any stale demand': 1 Wood on Limitations (1893), sec. 5. The statute of presumption has been repealed and for it has been substituted the statute of limitations, as a statute of repose which bars the remedy only."

## EFFECT OF THE BAR OF THE STATUTE OF LIMITATIONS.

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- a. General Theory and Policy of the Statute.
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### II. Bar of One of Two Remedies.

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### I. Introductory.

a. General Theory and Policy of the Statute.—In early times there was no system of limitations as the term is now understood. The first step toward such a system was the statute of 32 Henry

VIII, chapter 2, which was superseded by the statute of 31 Jacobus I, chapter 16. From that the limitation statutes of most of the American states have been modeled. The books abound with evidence that the change wrought in the common law was not favorably received by the courts, and the most subtle constructions were resorted to for the purpose of restricting its operation. The defense of the statute came to be regarded as dishonorable, and at most the bar of the statute merely raised a presumption of payment exceedingly easy to rebut. But in modern times a radical change in judicial policy has taken place. Courts have come to recognize the wholesome and beneficial effects of the statute, and have given effect to the legislative purpose to the extent of repudiating the ancient doctrine of presumption of payment, and regarding the statute as a statute of repose. It is now regarded as entitled to, at least, a reasonable construction, and its defense is no longer thought unconscionable or dishonorable: *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Anaconda Min. Co. v. Saile*, 16 Mont. 8, 50 Am. St. Rep. 472, 39 Pac. 909; *Van Keuren v. Parmlee*, 2 N. Y. 523, 51 Am. Dec. 322; *Levy v. Cadet*, 17 Serg. & R. 126, 17 Am. Dec. 650; *Whereat v. Worth*, 108 Wis. 291, 81 Am. St. Rep. 899, 84 N. W. 441; *Bell v. Morrison*, 1 Pet. 351.

Said Justice Story: "I consider the statute of limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable, construction, in furtherance of its manifest object. It is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory or death or removal of witnesses. The defense, therefore, which it puts forth, is an honorable defense, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practicable manner, such as are ancient and unacknowledged, and whatever may have been their original value, such as are now beyond the power of the party to meet with all the proper vouchers and evidence to repel them. The natural presumption certainly is, that claims which have been long neglected are unfounded, or, at least, are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance or their overconfidence in regard to transactions which have become dim by age. Yet I well remember the time when courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defense; and when, to the reproach of the law, almost every ingenuity was exhausted to catch up loose and inadvertent phrases from the careless lips of the supposed



debtor, to construe them into an admission of the debt. Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation": *Spring v. Gray*, 5 Mason, 505, Fed. Cas. No. 13,259.

**b. Considered as Affecting the Remedy Only.**—With this innovation of the old theory, however, most of the courts have stopped; and, while recognizing the wholesomeness and policy of the statute of limitations, have not gone the full length in giving it force and effect. That is, they hold that it merely bars the remedy and does not extinguish the right: *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Belknap v. Gleason*, 11 Conn. 160, 27 Am. Dec. 721; *Commonwealth v. McGowan*, 4 Bibb (Ky.), 62, 7 Am. Dec. 737; *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; *Townsend v. Tyndale*, 165 Mass. 293, 52 Am. St. Rep. 513, 43 N. E. 107; *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728; *Pittsburgh etc. R. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770; *Brunswick Terminal Co. v. National Bank*, 88 Fed. 607. The consequences of this doctrine become apparent in case of a conflict of laws, or in case a creditor has more than one remedy on the same obligation.

**c. Considered as Extinguishing the Right.**—It would seem more consistent with the operation of a statute of repose to hold that it not only goes to the remedy, but takes away the right itself. Otherwise, only a partial repose is effected. This is the view taken in respect to tangible property, as will appear in a subsequent part of this note. And it is the conclusion reached by at least one court. In Wisconsin, it is held that the statute not only takes away the remedy for the enforcement of a claim, but extinguishes the right also: *Pierce v. Seymour*, 52 Wis. 272, 38 Am. Rep. 737; *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433. "What is meant by the term 'extinguish the right,' " says Justice Marshall in the last case cited, "as used in the adjudications and by the text-writers . . . is not actual satisfaction of the right by the operation of the statute of limitations. The idea is that a right to insist upon the statutory bar is a vested property right protected by the constitution, the effect of which is to forever prevent the judicial enforcement of the demand affected by it, against the will of the owner of the prescriptive right. Deprivation of the remedy under such circumstances that there can be no adverse restoration of it is a destruction or extinguishment of the right to which such remedy relates. The law deals only with enforceable rights, and if such a right be changed to a mere moral obligation, in a legal sense it no longer exists at all." The Georgia statute seems to bar the right as well as the remedy. Yet, if the statute is not pleaded, the court has jurisdiction to render judgment against the defendant: *Peel v. Bryson*, 72 Ga. 331.

**d. Bar of the Statute as a Vested Right.**—In nearly all the states of the Union in which the question has arisen it has been adjudged that the right to set up the bar of the statute of limitations as a defense to a cause of action, after the statute has run, is a vested right, and cannot be taken away by legislation, either by a repeal of the statute without a saving clause, or by an affirmative act; and that it is immaterial whether the action is for the recovery of real or personal property, or for the recovery of a moneyed demand, or for the recovery of damages for a tort: *Couch v. McKee*, 6 Ark. 484, 495; *Board of Education v. Blodgett*, 155 Ill. 441, 46 Am. St. Rep. 348, 40 N. E. 1025; *Lawrence v. Louisville*, 96 Ky. 595, 49 Am. St. Rep. 309, 29 S. W. 150; *Stipp v. Brown*, 2 Ind. 647; *Thompson v. Read*, 41 Iowa, 48; *Bradford v. Shine*, 13 Fla. 393, 7 Am. Rep. 239; *Bigelow v. Bemis*, 2 Allen, 496; *Woodman v. Fulton*, 47 Miss. 682; *Rockport v. Walden*, 54 N. H. 167, 20 Am. Rep. 131; *Ryder v. Wilson*, 41 N. J. L. 9; *Whitehurst v. Dey*, 90 N. C. 542; *Boldro v. Tolmie*, 1 Or. 176; *Moore v. Luce*, 29 Pa. St. 260, 72 Am. Dec. 629; *Girdner v. Stephens*, 48 Tenn. (1 Heisk.) 280, 2 Am. Rep. 700; *Ireland v. Mackintosh*, 22 Utah, 296, 61 Pac. 901; *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433.

Some authorities recognize this principal in regard to tangible property, but deny its application to debts: See *Jones v. Jones*, 18 Ala. 248; *Bentinck v. Franklin*, 38 Tex. 458. As stated by Justice Brannon: "Where title to property has vested under the statute of limitations, no act can, by extending the statute or reviving the remedy, impair such title. It would be unconstitutional, because depriving one of property without due process of law; but where the demand is on contract, or any class of action where the statute merely gives a defense, and does not vest property, there is no vested right to such mere defense, and the legislature may, by repeal of the statute or otherwise, revive the action, and deprive one of such defense": *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239.

The supreme court of the United States has decided that a debtor has no property in the bar of the statute of limitations as a defense to a promise to pay a debt, and that such bar may be removed by statute: *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209. This decision was dissented from by Justices Bradley and Harlan, and the dissenting opinion seems more in harmony with principle and the weight of authority. It has been so declared and adopted by two of the ablest courts in this country: *Board of Education v. Blodgett*, 155 Ill. 441, 46 Am. St. Rep. 348, 40 N. E. 1025; *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433. The general thought running through it is, that the constitutional guaranty against the deprivation of property without due process of law is not confined to tangible property, but extends to every species of vested right. "An exemption from a demand,"

said Justice Bradley, "or an immunity from prosecution in a suit, is as valuable to one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties and that the other is not, seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperiled by an action against me for money as it is against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defense to such an action of the greatest value to me? If it is not property in the sense of the constitution, then we need another amendment to that instrument." And in a later Illinois case the court remarks: "A right of defense against a money demand arising from the complete running of the statute of limitations is property within the protection of the constitutional guaranty of due process of law: *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367.

In *Mayor and Council of Hagerstown v. Sehner*, 37 Md. 180, it is held that a municipality has no vested right in the defense of the statute of limitations against an action for injuries suffered through a riot.

So long as there remains to the owner of property any remedy remaining for its recovery, the party in possession thereof acquires no title or vested right. Hence the legislature is competent to give the true owner additional remedies, or to restore to him an old one which has been lost by lapse of time: *Power v. Telford*, 60 Miss. 195.

In concluding this branch of our subject, we call attention to the effect of special or short statutes of limitations. A statute of this kind was under consideration in *Kipp v. Johnson*, 31 Minn. 360, 17 N. W. 957, and in passing upon the effect of the bar thereof, the court observed: "What are often indiscriminately called statutes of limitation consist of two distinct classes: First, statutes of limitation, properly so called, where the prescription operates as the foundation of title to property in possession. The lapse of time limited by such statutes not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder. The second class are those which merely take away or suspend certain remedies or forms of actions, but leave the property rights of the parties unaffected. This last class is rather an exemption from the servitude of certain forms of action than a means of acquisition of title. In such a case, the legislature would have a perfect right to restore the remedy already barred, because it would not take away any vested rights of property."

**e. Conflict of Laws.**—If the statute of limitations goes to the remedy merely, without affecting the right, then the statute of the forum must govern. Hence an action, though not barred where it arose, may be barred by the law where it is sought to be enforced; and, on the other hand, though barred by the law of the state where it

arose, may not be barred by the law of the forum: *Jones v. Jones*, 18 Ala. 248; *Bulger v. Roche*, 11 Pick. 36, 22 Am. Dec. 359; *Wright v. Mordaunt*, 77 Miss. 537, 78 Am. St. Rep. 536, 27 South. 640; *Carson v. Hunter*, 46 Mo. 467, 2 Am. Rep. 529; *Underwood v. Patrick*, 94 Fed. 468; note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 878.

But if the statute of limitations of the place where a contract is made operates to extinguish the contract or debt itself, no action can thereafter be maintained upon such contract in the courts of another state: *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; *Berkley v. Tootle*, 163 Mo. 584, 85 Am. St. Rep. 587, 63 S. W. 681; *Rathbone v. Coe*, 6 Dak. 91, 50 N. W. 620. This question was squarely met in *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433, where it was held that when the operation of the statute is complete, the right to the benefit of the bar thus created is property, and protected as such by constitutional guaranty, like any other property, and such property goes with the possessor into any jurisdiction in which he may travel.

Title by prescription to personal property must be respected on the removal of the property to another state. When a title becomes perfect under the laws of one state it is valid in any other, although the period of limitations there is longer than in the jurisdiction where the title was acquired: *Freeman v. Baldwin*, 13 Ala. 246; *Broh v. Jenkins*, 9 Mart. (La.) 526, 13 Am. Dec. 320.

## II. Bar of One of Two Remedies.

a. **As Affecting Bar of the Other.**—When a person has more than one remedy for the enforcement of a right, the bar of the statute of limitations as to one of these does not necessarily affect the other, leastwise if the statute is considered as going to the remedy only. Thus, if one has a right to bring trover for the conversion of a chattel, or assumpsit for the proceeds of sale, the fact that the statute has run against one action does not defeat the other: *Ivey v. Owens*, 18 Ala. 641. And if, upon the conversion of personalty, the owner may sue for the property itself, or damages for its conversion, or the value of the property as a debt, he may pursue one of these remedies, notwithstanding the other is unavailable through lapse of time: *Kirkman v. Phillips*, 54 Tenn. (7 Heisk.) 222. That an account is "out of date" will not prevent a recovery upon a note of the debtor held by the creditor as security for the account: *Shipp v. Davis*, 78 Ga. 201, 2 S. E. 549. A suit to dissolve or rescind a sale for nonpayment of the price is not prescribed, because the purchase money notes are: *Templeman v. Pegues*, 24 La. Ann. 537; *School Directors v. Anderson*, 28 La. Ann. 739; *Jackson v. Palmer*, 52 Tex. 427. Though the right of a buyer of goods to recover damages for the defects therein is barred, he may set up the defects in an action for the purchase price: *Lastropes v. Rocquet*, 23 La. Ann. 68.



The theory that the bar of one remedy does not operate to bar another for the enforcement of a demand will find frequent illustration under the subdivisions of this note to follow.

### III. Pledge or Collateral Security.

**a. As Affected by Bar of Debt.**—A deposit of collaterals does not prevent or impede the running of the statute of limitations upon the debt secured thereby, but the barring of any action upon such debt through the running of the statute does not affect the right of the pledgee to hold and realize upon the collateral, nor the pledgor to call for any surplus remaining after the principal debt has been paid: *Jones v. Bank of Albany*, 27 N. Y. Super. Ct. (4 Rob.) 221, 29 N. Y. Super. Ct. (6 Rob.) 162; *Hartranft's Estate*, 153 Pa. St. 530, 34 Am. St. Rep. 717, 26 Atl. 104; *Caven v. Harsh*, 186 Pa. St. 132, 40 Atl. 321; *Gage v. Riverside Trust Co.*, 86 Fed. 984; *Spears v. Hartley*, 3 Esp. 81; monographic note to *Griggs v. Day*, 32 Am. St. Rep. 716. A reference to this note, however, will show that other views on the question have been entertained.

The pledgee may enforce a payment of his debt, when stock is pledged, by a sale of the collateral, though the debt is barred: *Tombler v. Palestine Ice Co.*, 17 Tex. Civ. App. 596, 43 S. W. 896. And the fact that the debt is barred does not prevent the pledgee from suing for the conversion of the pledge: *Hudson v. Wilkinson*, 61 Tex. 606.

A creditor's rights as the pledgee of a life insurance policy are not lost by the statute of limitations running against the debt: *Pollock v. Smith*, 107 Ky. 509, 54 S. W. 740; *Connecticut Mut. Life Ins. Co. v. Dunscorn*, 108 Tenn. 724, 69 S. W. 345. The running of the statute against a debt which a policy of insurance was pledged to secure does not prevent the enforcement of a claim arising out of such policy, nor does it impair the rights of the holders of the indebtedness to the proceeds of the insurance: *Townsend v. Tynedale*, 165 Mass. 293, 52 Am. St. Rep. 513, 43 N. E. 107.

### IV. Lien and Principal Obligation.

**a. Bar of One as a Bar of the Other.**—If a lien is deemed merely accessory to the principal obligation, then it is extinguished by the lapse of time within which an action on the latter may be brought: *California Sav. Bank v. Parrish*, 116 Cal. 254, 48 Pac. 73; *Flewellen v. Cochran*, 19 Tex. Civ. App. 499, 48 S. W. 39. A statute which applies to an action on the debt applies to the lien which secures the debt. This, it is believed, is the true theory, but it is not universally recognized, as will appear at different points in this note. And so long as the debt continues a subsisting obligation, the lien remains as an incident thereto: *Myers v. Humphreys* (Tex. Civ. App.) 47 S. W. 812. It is held that a lien on corporate stock is not lost, notwithstanding the debt is outlawed: *Farmers' Bank v. Igle-*

hart, 6 Gill (Md.), 50. Thus, a lien on its stock given a corporation by its charter for the debts of the holder is not extinguished by the statute running against the debts: Reading Trust Co v. Reading Iron Works, 137 Pa. St. 282, 21 Atl. 169. And a corporation having a lien upon the stock of a shareholder by reason of his having embezzled the funds of the corporation, does not lose its right to enforce its claim by allowing more than six years to elapse after the discovery of the embezzlement: Sproul v. Standard Glass Co., 201 Pa. St. 103, 50 Atl. 1003. In this case the lien was in the nature of collateral security, which places the decision on another basis; and perhaps this is true of the two preceding cases. In Waterfield v. Rice, 111 Fed. 625, 49 C. C. A. 504, it is held that a lien on devised land for the installments of an annuity is not barred, although the debt is.

**b. Vendor's Lien.**—There is a long line of cases holding that a vendor's lien for the purchase money of lands is preserved, although the statute of limitations has barred the recovery of the purchase money as a debt: Driver v. Hudspeth, 16 Ala. 348; Relfe v. Relfe, 34 Ala. 500, 73 Am. Dec. 467, Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38; Shorter v. Frazer, 64 Ala. 74; Phillips v. Adams, 78 Ala. 225; Hood v. Hammond, 128 Ala. 569, 86 Am. St. Rep. 159, 30 South. 540; Magruder v. Peter, 11 Gill & J. (Md.) 217; Paxton v. Rich. 85 Va. 378, 7 S. E. 531; Tunstall v. Withers, 86 Va. 892, 11 S. E. 565; Evans v. Johnson, 39 W. Va. 299, 45 Am. St. Rep. 912, 19 S. E. 623; Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. Rep. 771.

Other authorities maintain that such lien expires when the debt or the evidence thereof is outlawed, and cannot thereafter be enforced: Linthicum v. Tapscott, 28 Ark. 267; Waddell v. Carlock, 41 Ark. 523; Stephens v. Shannon, 43 Ark. 464; California Sav. Bank v. Parrish, 116 Cal. 254, 48 Pac. 73; Ilett v. Collins, 103 Ill. 74.

In Arkansas it is held that the lien of a vendor of land reserved in the face of the deed expires when the debt is barred by the statute of limitations: Chase v. Cartright, 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90. In Texas, however, if land is conveyed, and a lien is reserved in the deed or a contemporaneous mortgage, or in notes given for the purchase money, the vendor may recover the land, although the notes are barred by limitation: Barber v. Hoffman (Tex. Civ. App.), 37 S. W. 769.

While the plea of the five years' statute of limitation to a purchase money note may not be good in bar of a judgment in rem for the sale of the lands, it is a bar to the recovery of a personal judgment against the defendant: Buckner v. Street, 5 McCrary, 59, 15 Fed. 365. The action in this case was for the foreclosure of a vendor's lien reserved in the deed.

The assignee of a purchase money note, secured by a vendor's lien, is not entitled to subject the land to the payment of the note, nor

to enforce the lien after the statute has run against the note: *Farmers' Loan etc. Co. v. Beekley*, 93 Tex. 267, 54 S. W. 1027.

As against a remote vendee, a vendor's lien does not subsist after the statute of limitations has run against a note given for the purchase money, and the first vendee cannot extend the lien by payments upon the note: *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181.

The renewal of a purchase money note given for land, or a new promise within six years after its maturity, is sufficient to prolong the life of the vendor's lien, and, as against the vendee in possession, puts the statute of limitations in operation against it, only from the maturity of the renewal or from the date of the new promise: *Poindexter v. Rawlings*, 106 Tenn. 97, 82 Am. St. Rep. 869, 59 S. W. 766. But see *McElwee v. McElwee*, 97 Tenn. 649, 37 S. W. 560.

## V. Mortgage or Trust Deed and the Debt Secured.

### a. Mortgage of Real Property.

**1. Bar of Debt Considered as not Barring Mortgage.**—There is an abundance of judicial authority to the effect that the life of a mortgage of real estate is not measured by that of the obligation which it is given to secure, and that the mortgagee can pursue his remedy on the mortgage, by foreclosure or ejectment, notwithstanding the debt or the evidence thereof is barred by the statute of limitations: *Birnie v. Main*, 29 Ark. 591; *Belknap v. Gleason*, 11 Conn. 160, 27 Am. Dec. 721; *Hough v. Bailey*, 32 Conn. 288; *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96; *Jordan v. Sayre*, 24 Fla. 1, 3 South. 329; *Elkins v. Edwards*, 8 Ga. 325; *Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Baltimore etc. R. R. Co. v. Trimble*, 51 Md. 99, 111; *Demuth v. Old Town Bank*, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 266; *Thayer v. Mann*, 19 Pick. 535; *Mich. Ins. Co. v. Brown*, 11 Mich. 265; *Webber v. Ryan*, 54 Mich. 70, 19 N. W. 751; *Trotter v. Erwin*, 27 Miss. 772; *Nevitt v. Bacon*, 32 Miss. 212, 66 Am. Dec. 609; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391; *Benton County v. Czarlinsky*, 101 Mo. 275, 14 S. W. 114; *Tucker v. Wells*, 111 Mo. 399, 20 S. W. 114; *Eyermaun v. Piron*, 151 Mo. 107, 52 S. W. 229; *Campbell v. Upton*, 56 Neb. 385, 76 N. W. 910; *Yarnal v. Hupp* (Neb.), 90 N. W. 645; *Mackie v. Lansing*, 2 Nev. 302; *Cookes v. Culbertson*, 9 Nev. 199; *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728; *Heyer v. Pruyn*, 7 Paige, 465, 34 Am. Dec. 355; *Pratt v. Huggins*, 29 Barb. 277; *Hulburt v. Clark*, 128 N. Y. 295, 28 N. E. 638; *Capehart v. Dettrick*, 91 N. C. 344; *Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696; *Hedrick v. Byerly*, 119 N. C. 420, 25 S. E. 1020; *Satterlund v. Beal* (N. Dak.), 45 N. W. 518; *Kerr v. Lydecker*, 51 Ohio St. 240, 37 N. E. 267; *Ballou v. Taylor*, 14 R. I. 277; *Nichols v. Briggs*, 18 S. C. 473; *Alexander v. Ransom* (S. Dak.), 92 N. W. 418; *Wallace v. Goodlett*, 104 Tenn. 670, 58 S. W. 343; *Reed v. Shepley*, 6 Vt. 602; *Richmond v. Aiken*, 25 Vt. 324; *Gleason v. Kinney*, 65 Vt. 560, 27 Atl. 208; *Potter v. Stransky*, 48

Wis. 235, 4 N. W. 95; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614; *Cheney v. Stone*, 29 Fed. 885; *Sparks v. Pico*, 1 McAll. 497, Fed. Cas. No. 13,211. This rule is held to apply to a purchaser of the premises from the mortgagor: *Ellis v. Fairbanks*, 38 Fla. 257, 21 South. 107, citing *Inge v. Boardman*, 2 Ala. 331; *Norton v. Palmer*, 142 Mass. 433, 8 N. E. 346; *Fievel v. Zuber*, 67 Tex. 275, 3 S. W. 273. And, in foreclosure proceedings, the judgment includes interest for the entire period: *Wiswell v. Baxter*, 20 Wis. 680.

These decisions, for the most part, proceed on the theory that the statute of limitations goes to the remedy merely, without extinguishing the right; and, since a mortgagee has two remedies—one on the security and one on the principal obligation—the bar of one of these is not necessarily destructive of the other. Some of them are justified by the fact that the statute expressly fixes a longer period of limitation in which foreclosure may be had than the time limited for an action on the note or debt secured. Some are defensible on the ground that the mortgage is a specialty, while the debt is a simple contract, in those jurisdictions where the distinction between the two still obtains; or that the mortgage is in writing and the debt in parol—the time limited by law, in case of the mortgage, being longer in both instances. And still others may be defensible, so far as concerns equitable remedies on the mortgage, by the statute applying in its terms only to particular legal remedies. The theory that a lien is merely accessory to the principal obligation, and therefore is without vitality when the latter expires (of which more will presently be said), has no application, in many cases, because the ancient notion that a mortgage is a conveyance is yet to be abrogated in some of the states.

If a mortgage contains a covenant for the payment of the money, a suit on the covenant may be maintained though the debt is barred: *Earnshaw v. Stewart*, 64 Md. 513, 2 Atl. 734. When such a covenant is found in a mortgage, it being under seal, a bar to the recovery of the debt, if of a shorter period than a bar to a sealed instrument, cannot affect the remedy on the covenant: *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259.

The doctrine announced by the foregoing cases has received legislative sanction in some states, and passed into the statutory law. For example, section 2735 of the Civil Code of Georgia reads: "That the note or other evidence of debt is barred does not prevent the creditor thereafter availing himself of the mortgage or other security": *Story v. Davis*, 110 Ga. 65, 35 S. E. 314. Other statutes, as we shall see later on, are quite different, and repudiate the rule previously laid down by the courts of the state where enacted.

**2. Bar of Debt Considered as Barring Mortgage.**—There is another line of decisions holding that a mortgage cannot be foreclosed when the note or other evidence of the indebtedness secured thereby is barred by the statute of limitations. If a suit on the debt is



barred, a suit on the mortgage is likewise barred. It is not necessary that the statute should specifically mention mortgages. The debt is the principal thing, the mortgage being merely an incident to it. Where this rule prevails, a statute which applies to the debt applies also to the lien or mortgage: *Lord v. Morris*, 18 Cal. 482; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225; *Newhall v. Sherman, Clay & Co.*, 124 Cal. 509, 57 Pac. 387; *Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259; *Pollock v. Maison*, 41 Ill. 516; *Emory v. Keighan*, 88 Ill. 482; *McMillan v. McCormick*, 117 Ill. 79, 7 N. E. 132; *Schifferstein v. Allison*, 123 Ill. 662, 15 N. E. 275; *Lilly v. Dunn*, 96 Ind. 220; *First Nat. Bank v. Thomas*, 8 Ky. Law Rep. 690, 3 S. W. 12; *Worsham v. Lancaster*, 20 Ky. Law Rep. 701, 47 S. W. 448; *Grayson v. Mayo*, 2 La. Ann. 927; *Succession of Linderman*, 3 La. Ann. 714; *Duty v. Graham*, 12 Tex. 427, 62 Am. Dec. 534; *Ross v. Mitchell*, 28 Tex. 150; *Bitter v. Calhoun (Tex.)*, 8 S. W. 523; *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263.

This, we believe, is the correct doctrine, assuming that the lien theory of mortgages prevails. "It seems that the logical conclusion is that when the indebtedness ceases to exist from any cause, the mortgage has no further existence; that the mortgage is a mere incident at all times; that, when the note is paid, the mortgage is paid; that, when the note is barred by the statute of limitations, the mortgage is barred; that payments made on the mortgage indebtedness suspend the running of the statute of limitations only against the party making the payment; that the mortgage can have no force and effect independently of the debt which it secures": *McLane v. Allison*, 7 Kan. App. 263, 53 Pac. 781, per Justice McElroy.

"It seems to us in accord with both law and reason that whatever infirmity affects and whatever statute is a bar to the principal should affect and bar the incident, which exists only by reason of it. An action to foreclose a mortgage or deed of trust is simply, in effect, an action to collect the debt to secure the payment of which was the sole purpose of its execution; and, when the statute, after the lapse of a certain time bars an action upon the debt for its collection, we believe it includes all actions seeking to effectuate that purpose": *McGovney v. Gwillim (Colo. App.)*, 65 Pac. 346, per Justice Wilson.

In some of the states the rule that in the foreclosure of mortgages the bar of the statute of limitations on the debt is a good defense is declared by statute: See *Whipple v. Johnson*, 66 Ark. 204, 49 S. W. 827; *Little v. Reid*, 75 Mo. App. 266. Such a statute applies to an action to recover possession of the premises, as well as to a suit to foreclose the mortgage: *American Mortgage Co. v. Milam*, 64 Ark. 305, 42 S. W. 417. But it does not apply to an action by a vendor upon purchase money notes under a bond for title, and to

enforce the lien thereof, the statute of limitations not running on the notes, because of the trust relations of the parties: *Williams v. Young* (Ark.), 71 S. W. 669. In Idaho, but one action can lie for the recovery of any debt secured by a lien upon real or personal property, and where such action is barred as to the debt, the lien is carried with it and likewise barred; and whatever will prevent the running of the statute upon one will prevent it upon both: *Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.

If a mortgagor removes to another state, and resides there for such a time as will defeat an action on the note given by him, this will not preclude a foreclosure of the mortgage in chancery, notwithstanding the general rule that a mortgage cannot be foreclosed when the debt secured thereby is barred by the statute of limitations: *Wooley v. Yarnell*, 39 Ill. App. 595.

**3. Deed of Trust.**—If a deed of trust is given to secure an obligation or indebtedness, and is in effect merely a mortgage, it is governed, in the matter of limitations against the debt, by the same rules already considered as applicable to mortgages. In accordance with the law of many jurisdictions that a suit to foreclose a mortgage is not necessarily barred by the fact that the statute has run against the debt, it is held that a trust deed may be foreclosed although the indebtedness which it secures has expired by limitation: *Bush v. Cooper*, 26 Miss. 599, 611, 59 Am. Dec. 270; *Long v. Long*, 141 Mo. 352, 44 S. W. 341; *Gary v. May*, 16 Ohio, 66; *Irvine v. Shrum*, 97 Tenn. 259, 36 S. W. 1089; *Smith v. Washington etc. R. R. Co.*, 33 Gratt. 617; *Gibson v. Green*, 89 Va. 524, 37 Am. St. Rep. 888, 16 S. E. 661; *Criss v. Criss*, 28 W. Va. 388. On the other hand, in those jurisdictions where a mortgage is barred when the debt is barred, a trust deed which in legal effect is only a mortgage, is likewise barred when the debt that it is given to secure is barred: *McGovney v. Gwillim* (Colo. App.), 65 Pac. 346. But even in these jurisdictions a deed of trust may be of such a character as to be enforceable, although the debt itself is barred: *Grant v. Burr*, 54 Cal. 298; *Williams v. Durst*, 35 Tex. 421; *Sprague v. Ireland*, 36 Tex. 654. Under a statute providing that in suits to foreclose or enforce mortgages or deeds of trust it shall be a sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given, an action at law to recover possession of the premises, as well as a suit in equity to foreclose, must be brought within the period limited for a suit on the principal obligation: *American Mortgage Co. v. Milam*, 64 Ark. 305, 42 S. W. 417.

**4. Equitable Mortgage—Deed Absolute and Other Securities.**—In an action of trespass to try title, it is decided in *McKeen v. James*, 87 Tex. 193, 25 S. W. 193, 27 S. W. 59, that the defense that the deed under which the plaintiff claims is in fact a mortgage, and that the debt which it secures is barred by limitations, may be set

up without tendering the amount of the debt. A creditor cannot, for the purpose of collecting a debt which has become barred by the statute of limitations, maintain against his debtor an action having for its object the enforcement of an equitable lien on land arising from an absolute conveyance thereof to the creditor and a contemporaneous parol agreement that he was to hold the title as security for the debt: *Story v. Davis*, 110 Ga. 65, 35 S. E. 314. And a security deed which does not in any way refer to the debt to secure which it was given, or furnish any evidence of its existence, cannot be foreclosed as an equitable mortgage, and a money judgment obtained thereon, if the obligation secured by the deed is barred by limitation: *Duke v. Story* (Ga.), 42 S. E. 722.

When the legal right of action upon a bond is barred by the statute, and the legal right of entry upon the lands mortgaged to secure the bond is likewise barred, the holder of the bond and mortgage cannot maintain a bill in chancery to collect the debt by sale of the lands, unless he can show some pertinent, equitable right beyond the ownership of the bond and mortgage: *Blue v. Everett*, 56 N. J. Eq. 455, 39 Atl. 765.

**5. Mortgage on Land of Married Woman.**—The refusal to foreclose a mortgage given to secure a note of a husband and wife for the reason that the title to the mortgaged land was in her, and that the debt as to her was barred, is error: *Cooper v. Haythorn* (Kan.), 71 Pac. 277, citing *Perry v. Horaek*, 63 Kan. 88, 88 Am. St. Rep. 225, 64 Pac. 990; *Jackson v. Longwell*, 63 Kan. 93, 64 Pac. 991; *Fuller v. McMahan*, 64 Kan. 441, 67 Pac. 828. As to the bar of a mortgage on the separate estate of a married woman, as affecting the debt, see post, p. 670.

**6. Power of Sale and Mortgage.**—The holding of the principal case that a power of sale in a mortgage or deed of trust may be exercised after the debt secured thereby is barred by the statute of limitations is followed by a later decision in *Cone v. Hyatt*, 132 N. C. 810, ante, p. 654, 44 S. E. 678, to the effect that the power of sale in a deed of trust or mortgage is not barred by limitation, though the statute has run against a suit for foreclosure. And in *Grant v. Burr*, 54 Cal. 298, it is held that where the legal title to real property is conveyed to a trustee to secure a debt, equity will not interfere to enjoin a sale under the deed, when the time limited for bringing an action on the debt has expired. The Missouri statute declares that "no suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust executed hereafter to secure any obligation to pay money or property shall be had or maintained after such obligation has been barred by the statutes of limitations": *Kreying v. O'Reilly* (Mo. App.), 71 S. W. 372.

**7. Personal or Deficiency Judgment.**—A mortgage does not keep alive the personal obligation to pay the debt which otherwise is barred: *Lashbrooks v. Hatheway*, 52 Mich. 124, 17 N. W. 723. And

when the debt to secure which a mortgage is executed, is barred by the statute of limitations, a personal or deficiency judgment cannot be entered in a foreclosure suit: *Patrick v. National Bank of Commerce*, 63 Neb. 200, 88 N. W. 183; *Overholt v. Dietz (Or.)*, 72 Pac. 695; *Cerney v. Pawlot*, 66 Wis. 262, 28 N. W. 183.

**8. Reciprocal Right of Foreclosure and Redemption.**—A mortgagee's right of action on the debt, and to enforce the mortgage given to secure it, and the mortgagor's right of action for the redemption of the property from the mortgage lien, are mutual and reciprocal, and when one is barred by the statute of limitations, the other is also: *Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73. See, also, *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530; *Halton v. Meighen*, 15 Minn. 69; *King v. Meighem*, 20 Minn. 264; *Parsons v. Noggle*, 23 Minn. 328.

**b. Mortgage of Chattels.**—Following the rule previously laid down as to mortgages of real property, the court, in *McGowan v. Reid*, 27 S. C. 262, 3 S. E. 337, holds that the bar of the statute of limitations against a note secured by a chattel mortgage is not necessarily a bar to the enforcement of the mortgage. Such is the law if there is a change of possession in the property, in which case the creditor is, in effect, a pledgee: *Hudson v. Wilkinson*, 61 Tex. 606. And such may be the law where the idea that the mortgage operates to transfer title is not yet obsolete. But if a chattel mortgage is considered in its true light as a mere lien, we believe that it must be barred when the principal obligation is barred, since it is merely accessory thereto.

The fact that a mortgage note is barred does not affect the mortgagee's right to enforce a covenant for payment contained in a chattel mortgage: *Dinning v. Gavin*, 39 N. Y. Supp. 485, 4 App. Div. 298; affirmed 159 N. Y. 556, 54 N. E. 1090.

**c. Bar of Mortgage as Affecting Debt.**—If a mortgage is a mere incident to the debt which it is given to secure, it necessarily follows that it lives as long as the debt, and that it may be foreclosed so long as an action upon the debt is not barred by the statute of limitations: *Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019; *Hagan v. Parsons*, 67 Ill. 170; *Hibernian Banking Assn. v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919; *Brown v. Rockhold*, 49 Iowa, 282; *Jenks v. Shaw*, 99 Iowa, 604, 61 Am. St. Rep. 256, 68 N. W. 900; *Prewitt v. Wortham*, 79 Ky. 287; *Clift v. Williams*, 105 Ky. 559, 49 S. W. 328, 51 S. W. 821; *Berry v. Marshall*, 23 La. Ann. 244; *Fraser v. Bean*, 96 N. C. 327, 2 S. E. 159; *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434. Thus, where by reason of the nonresidence of the mortgagor, the statute has not run against his note, an action to foreclose his mortgage or deed of trust is not barred: *Clinton County v. Cox*, 37 Iowa, 570.

Therefore, if the mortgage debt is kept alive by renewal, extension of time, part payment, subsequent agreement, or otherwise,



the vitality of the mortgage is thereby sustained, and it continues enforceable by foreclosure: *Austin v. Steele*, 68 Ark. 348, 58 S. W. 352; *London etc. Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 583; *Newhall v. Hatch*, 134 Cal. 269, 66 Pac. 266; *Murray v. Emery*, 187 Ill. 408, 58 N. E. 327; *Kenaston v. Lorig*, 81 Minn. 454, 84 N. W. 323; *Shaw v. Western Land etc. Co. (Tex. Civ. App.)*, 62 S. W. 941. In the above Minnesota case, the court expressly refrain from deciding whether the same rule applies to a foreclosure by advertisement.

A chattel mortgage is within the doctrine announced by the above decisions: *Arlington Mill etc. Co. v. Yates*, 57 Neb. 286, 77 N. W. 677.

The law is not clear as to whether the revivor of a debt after the statute has once run against it will also revive the mortgage given to secure it. It has been held that the revivor of the debt by an admission or new promise operates as a revivor of the mortgage also: *Mahon v. Cooley*, 36 Iowa, 479; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72. But a contrary conclusion is reached in *Weimberger v. Weidman*, 134 Cal. 599, 66 Pac. 869. The mortgagor cannot, by reviving the debt, revive the mortgage as against his grantee: *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263.

If a husband and wife execute a mortgage on their homestead to secure the payment of a note made by him only, his payment of interest from time to time, though without her knowledge, prevents the running of the statute of limitations, and the mortgage may be foreclosed in a suit commenced more than five years after the note became due: *Skinner v. Moore*, 64 Kan. 360, 91 Am. St. Rep. 244, 67 Pac. 827. And where a mortgage on a homestead, the title to which is in the wife, is executed by both husband and wife, to secure the payment of a note made by both, the statute will not bar a foreclosure of the mortgage so long as an action to recover the debt may be maintained against him, he having executed an extension agreement, although an action on the debt is barred as against her: *Investment Securities Co. v. Manwarren*, 64 Kan. 636, 68 Pac. 68. The case of *Jackson v. Longwell*, 63 Kan. 93, 64 Pac. 991, presents an identical state of facts, except that the mortgaged land was the separate property of the wife, and that the husband made payments which tolled the statute as to him. It was held that her property could be sold to pay the judgment rendered against him.

A mortgage of a homestead, given to secure a note executed by a husband and wife, may, after the husband's death, and after the expiration of a period of time equal to the statute of limitations, be enforced against the entire homestead, and against the interests of the widow and minor children, where the debt has been kept alive by payments made by the wife: *Perry v. Horack*, 63 Kan. 88,

88 Am. St. Rep. 225, 64 Pac. 990. So the payment by the principal debtor, after the death of his wife, of interest on a note executed by him alone, though secured by a mortgage on her separate property executed by her, keeps alive the lien upon the property for the security of the debt: *Cross v. Allen*, 141 U. S. 28, 12 Sup. Ct. Rep. 67.

#### VI. Prescriptive Title to Property.

a. **To Personal Property.**—The adverse possession of a chattel for the period of limitation prescribed by law vests a good title thereto: *Sadler v. Sadler*, 16 Ark. 628; *Pryor v. Ryburn*, 16 Ark. 671; *Ewell v. Tidwell*, 20 Ark. 136; *Thompson v. Caldwell*, 3 Litt. (13 Ky.) 136; *Moore v. Green*, 3 B. Mon. (42 Ky.) 407; *Call v. Ellis*, 32 N. C. (10 Ired.) 250; *Gregg v. Bingham*, 1 Hill (S. C.), 299, 26 Am. Dec. 181; *Simons v. Fox*, 12 Rich. (S. C.) 392; *Connor v. Hawkins*, 71 Tex. 582, 9 S. W. 684; *Merrill v. Bullard*, 59 Vt. 389, 8 Atl. 157; *Brent v. Chapman*, 9 U. S. (5 Cranch) 358; *Shelby v. Guy*, 24 U. S. (11 Wheat.) 361. In many of the above cases, as well as those in the following paragraphs, the property was a slave.

It has been contended that, as in cases of contract, the statute of limitation goes only to the remedy without extinguishing the right or title to the chattel: See the dissenting opinion in *Chapin v. Freeland*, 142 Mass. 383, 56 Am. Rep. 701. And there is a holding to this effect in *Goodwin v. Morris*, 9 Or. 322. But according to the better rule and the weight of authority the statute not only takes away the remedy, but divests the title to the property, and creates in the possessor an absolute ownership: *Sims v. Canfield*, 2 Ala. 555; *Newcombe v. Leavitt*, 22 Ala. 631; *Kegler v. Miles*, 1 Mart. & Y. (Tenn.) 426, 17 Am. Dec. 819; *Rower v. Robertson* (Tex. Civ. App.), 29 S. W. 916; *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209.

Hence, the title acquired by adverse possession of personal property is a good defense in replevin: *Morris v. Lowe*, 97 Tenn. 243, 36 S. W. 1098. Moreover, it will support an action by the adverse holder for the recovery of possession (*Wynn v. Lee*, 5 Ga. 217; *Clark v. Slaughter*, 34 Miss. 65), even against the original owner: *Hicks v. Flint* 21 Ark. 463; *Stanley v. Earl*, 15 Ky. (5 Litt.) 281, 15 Am. Dec. 66; *Clarke v. Butler*, 30 Ky. (7 J. J. Marsh.) 194; *Partee v. Badget*, 4 Yerg. (Tenn.) 174, 26 Am. Dec. 220. And when the statute is a bar to any proceeding at law, it should be applied by analogy with the same effect in a court of equity: *Altoona etc. R. R. Co. v. Pittsburgh etc. R. R. Co.*, 203 Pa. St. 102, 52 Atl. 6. A purchaser from against whom the statute has run is entitled to stand in as good a position as his vendor: *Chapin v. Freeland*, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128.

Title to stolen property may be acquired through adverse possession by an innocent holder: *Dragoo v. Cooper*, 72 Ky. (9 Bush) 629. And, after acquiring the title, he may maintain replevin against

the former owner, who has reacquired possession of the chattel: *Garrett v. Vaughan*, 60 Tenn. (1 Baxt.) 113.

The ownership of the natural increase of property held adversely is not clear. In *Bryan v. Weems*, 28 Ala. 423, 65 Am. Dec. 407, it is decided, Chief Justice Rice dissenting, that the statute which bars the recovery of a female slave held in adverse possession also bars the recovery of her children born after the commencement of the adverse possession. But in *McVaughers v. Elder*, 2 Brev. (S. C.) 307, it is held that such children belong to the former owner, and not to the adverse claimant.

Title by prescription or adverse possession must be respected on the removal of the property to another state. When the statute of limitations has run, the title of the possessor is complete, notwithstanding he subsequently removes to a jurisdiction where the period of limitations is longer. In such a case, it is not the statute of limitations of another state that is relied upon, but the title acquired by operation of the statute; and, when a title becomes perfect under the laws of one state, it is valid in any other: *Freeman v. Baldwin*, 13 Ala. 246; *Howell v. Hair*, 15 Ala. 194; *Southwestern R. R. Co. v. Atlantic etc. R. R. Co.*, 53 Ga. 401; *Broh v. Jenkins*, 9 Mart. (La.) 526, 13 Am. Dec. 320; *Fears v. Sykes*, 35 Miss. 633.

#### b. To Real Property.

1. **Force and Effect of, in General.**—The statute of limitations, whenever the conditions upon which it takes effect have been fully complied with, vests in the adverse occupant of real property the title thereto. Some of the decisions use the term “fee simple”; others “perfect title”; and others, “absolute title”: *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722; *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205; *Sherwood v. Barlow*, 19 Conn. 471; *Keppel v. Dreier*, 187 Ill. 298, 58 N. E. 386; *Renner v. Kannally*, 96 Ill. App. 392; *Brown v. Anderson*, 90 Ind. 93; *De Long v. Muleher*, 47 Iowa, 445; *Snell v. Iowa Homestead Co.*, 59 Iowa, 701, 13 N. W. 848; *Cramer v. Clow*, 81 Iowa, 255, 47 N. W. 59; *Erdman v. Corse*, 87 Md. 506, 40 Atl. 107; *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137; *Ridgeway v. Holaday*, 59 Mo. 444; *Farrar v. Heinrich*, 86 Mo. 521; *Ballou v. Sherwood*, 32 Neb. 667, 49 N. W. 790, 50 N. W. 1131; *Black v. Leonard*, 33 Neb. 745, 51 N. W. 126; *Fink v. Dawson*, 52 Neb. 647, 72 N. W. 1037; *Grant v. Fowler*, 39 N. H. 101; *Solomon v. Yrisarri*, 9 N. Mex. 480, 54 Pac. 752; *Covington v. Stewart*, 77 N. C. 148; *Christenburg v. King*, 85 N. C. 229; *Hoey v. Furman*, 1 Pa. St. 295, 44 Am. Dec. 129; *Moore v. Luce*, 29 Pa. St. 260, 72 Am. Dec. 629; *Turner v. Rogers*, 38 Tex. 582; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703; *Harpending v. Dutch Church*, 41 U. S. (16 Pet.) 455; *Probst v. Presbyterian Church*, 129 U. S. 182, 9 Sup. Ct. Rep. 263; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. Rep. 720; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. Rep. 458; *H. B. Clafin Co. v. Middlesex Banking Co.*, 113 Fed. 958.

And whether or not the occupant has color of title is immaterial, unless expressly required by the statute, if the essentials of adverse possession concur for the full statutory period; although, if there is an absence of color of title, the rights of the occupant will be limited to the property actually brought under his possession, he cannot obtain title to the whole tract by virtue of adversely holding a part thereof: *Roots v. Beck*, 109 Ind. 472, 9 N. E. 698; *Elder v. McCloskey*, 70 Fed. 529, 17 C. C. A. 251; monographic note to *Power v. Ketching*, 88 Am. St. Rep. 703, 704.

In respect to real property, at least according to the modern decisions, the statute of limitations is neither a statute of presumption, nor of repose, but is a statute operating to divest the title out of the excluded owner and to vest it in the adverse occupant. Not only does it bar the remedy by the person ousted, but it extinguishes his right or title, and confers it upon his disseisor: *Baker v. Chastang*, 18 Ala. 417; *Kirton v. Bull*, 168 Mo. 622, 68 S. W. 927; *Postal v. Martain* (Neb.), 95 N. W. 8; *Hopkins v. Calloway*, 47 Tenn. (7 Cold.) 137; *Leffingwell v. Warren*, 67 U. S. (2 Black) 599; *Bicknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. Rep. 399; *East Tennessee Iron etc. Co. v. Wiggin*, 68 Fed. 446.

“A title acquired by adverse possession is a title in fee simple, and is as perfect as a title by deed. The legal effect not only bars the remedy of the owner of the paper title, but divests his estate, and vests it in the party holding adversely for the required period of time, and is conclusive evidence of such title. To say that the statutes upon this subject only bar the remedy, as some authorities do, is only to leave the fee in the owner of the paper title, thus leaving the owner with a title, but without a remedy. We think the better and more logical rule is to hold that the occupier of the premises by adverse possession acquires title by that possession, predicated upon the presumption or proven fact that the prior owner has abandoned the premises. Adverse possession ripens into a perfect title. This title the adverse possessor can transfer by conveyance, and when he does so he is conveying his own title, and not a piece of land where the title is in some other person, who is simply barred of any remedy from recovering it”: *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060.

To the same effect is *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. 312, from which the following is an extract: “We cannot, however, assent to the proposition that adverse possession of land for a period sufficient to bar an action merely cuts off the owner’s remedy without affecting the estate. While this principle is not without the sanction of judicial authority, and that of text-writers, we think that the tendency of modern decisions in this and most of the states, as well as in the federal tribunals, is against it. . . . Adverse possession of tangible property implies not only the lapse of time, but the occupation and enjoyment by the possessor, and the



acquiescence of the true owner in a hostile claim of title. The idea that the title to property can survive the loss of every remedy known to the law for reducing it to possession and enjoyment would seem to have but small support in logic or reason. Enactments which are appropriately termed statutes of repose when applied to the adverse possession of land, have, as it seems to us, a broader and deeper effect than simply to destroy the remedy of the true owner for its recovery.”

Some of the statutes of limitation, probably most of them, merely operate, in form, upon the right of action. Nevertheless, their legal effect is to vest a complete title in the adverse holder: *Hatch v. Munden* (Wis.), 94 N. W. 332. Other statutes expressly provide that adverse possession makes a good title in the occupant: *Woodward v. Faris*, 109 Cal. 12, 41 Pac. 781; *Radican v. Radican*, 22 R. I. 405, 48 Atl. 143.

Title by adverse possession is as good as a paper title. The statute of limitations confers as complete a title as does a written conveyance: *Bowen v. Preston*, 48 Ind. 367; *School Dist. v. Benson*, 31 Me. 381, 52 Am. Dec. 618; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *Wilhelm v. Federgreen*, 38 N. Y. Supp. 8, 2 App. Div. 483, affirmed in 157 N. Y. 713, 53 N. E. 1133; *Hughes v. Graves*, 39 Vt. 359, 94 Am. Dec. 331; *Hodges v. Eddy*, 41 Vt. 485, 98 Am. Dec. 612; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395.

A deed by one who has acquired title to property by adverse possession vests a good title in the grantee: *McKay v. Gardner*, 120 Mich. 267, 79 N. W. 185.

If a grantor remains in possession, or afterward takes possession, and holds adversely for the period of limitations, the title is reinvested in him: *Hines v. Robinson*, 57 Me. 324, 99 Am. Dec. 772; *Scarboro v. Scarboro*, 122 N. C. 234, 29 S. E. 352. And a title subsequently acquired by him inures to his benefit, and not to that of the grantee: *Garabaldi v. Shattuck*, 70 Cal. 511, 11 Pac. 778. A purchaser from such a grantee acquires no title, although he had no notice that the original grantor held adversely: *Fain v. Miles*, 22 Ky. Law Rep. 1584, 60 S. W. 939.

When the statute of limitations has run in favor of a disseisor, no subsequent acknowledgment of the former owner's title, except by deed sufficient to pass title to land, will divest the title acquired by adverse possession: *Sage v. Rudnick*, 67 Minn. 362, 69 N. W. 1096. See, too, *Tennessee Coal etc. R. R. Co. v. Linn*, 123 Ala. 112, 82 Am. St. Rep. 108, 26 South. 245. Title is not lost by a subsequent entry of another claimant, and an interruption in the possession for less than the statutory period: *Cervena v. Thurston*, 59 Neb. 343, 80 N. W. 1048; *Spottiswoode v. Morris etc. R. R. Co.*, 61 N. J. L. 322, 40 Atl. 505; *Sherman v. Kane*, 86 N. Y. 57. The disseised owner cannot, by wrongfully obtaining possession and conveying the property, cut off the occupant's title: *Faloon v. Sims-*

hauser, 130 Ill. 649, 22 N. E. 835. And the owner of land by adverse possession is not required, in order to protect himself against a purchaser of the prior owner, to give notice of his claim by instituting legal proceedings: *East Texas Land etc. Co. v. Shelby*, 17 Tex. Civ. App. 685, 41 S. W. 542.

The accretions to land adversely held belong to the occupant upon his title to the main land becoming complete: *English v. Craford* (Iowa), 94 N. W. 276. It is held in *Benne v. Miller*, 149 Mo. 228, 50 S. W. 824, that accretions formed during the acquisition of his title to the main land by adverse possession are included in such title, however recent the formation: But see *McKee v. Grand Rapids* (Mich.), 95 N. W. 85.

It remains to be said that a title established by adverse possession may not only be used as a defense, but that it may be actively asserted by affirmative action either against a third person or the original owner: *Jacks v. Chaffin*, 34 Ark. 534; *McDuffee v. Sinnott*, 119 Ill. 449, 10 N. E. 385; *Kepley v. Scully*, 185 Ill. 52, 57 N. E. 187; *Green v. Couse*, 127 N. Y. 386, 24 Am. St. Rep. 458, 28 N. E. 15. Numerous illustrations of this principle will presently appear under "Ejectment," "Quieting Title," etc. Title by adverse possession may be affirmatively set up by the defendant under a general denial of the plaintiff's title: *Sutton v. Clark*, 59 S. C. 440, 82 Am. St. Rep. 848, 38 S. E. 150.

2. **In Actions of Ejectment.**—When title to real estate has been fully acquired and perfected, it is a good defense to an action of ejectment: *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38, 28 South. 402; *Pepper v. Pepper*, 2 Marv. (Del.) 221, 43 Atl. 90; *Briscoe v. Holder*, 111 Ga. 877, 36 S. E. 960; *Wooley v. McCormick*, 20 Ky. Law Rep. 272, 45 S. W. 885; *Den v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Patten v. Scott*, 118 Pa. St. 115, 4 Am. St. Rep. 576, 12 Atl. 292; *Snow v. Rich*, 22 Utah, 123, 61 Pac. 336; *Andrews v. Roseland Iron etc. Co.*, 89 Va. 393, 16 S. E. 252. It may be proved under the general issue: *Shaw v. Revel*, 21 Ky. Law Rep. 348, 51 S. W. 566. When the action is joint, if the defendant has a good prescriptive title against one plaintiff, there can be no recovery, although as to the other plaintiff there is no such title: *Wooding v. Blanton*, 112 Ga. 509, 37 S. E. 720.

And, if the holder of such a title is ousted of his possession, either by a third person or the former owner, he may maintain ejectment to recover the premises: *Donahue v. Illinois Cent. R. R. Co.*, 165 Ill. 640, 46 N. E. 714; *Sanitary Dist. v. Allen*, 178 Ill. 330, 52 N. E. 109; *Crockett v. Lashbrook*, 5 T. B. Mon. (Ky.) 531, 17 Am. Dec. 98; *Lantry v. Wolff*, 49 Neb. 374, 68 N. W. 494; *Patterson v. Reigle*, 4 Pa. St. 201, 45 Am. Dec. 684; *Ferguson v. Kennedy*, Peck (Tenn.), 321, 14 Am. Dec. 761; *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *Hackett v. Marmet Co.*, 52 Fed. 268. "After title is acquired by adverse possession, the holder

thereof, if from choice or by force or fraud, he loses the actual possession, may recover the same by suit in the same manner as if he had perfect paper title. Having once acquired title, he can be divested of it only by due process of law": *Sutton v. Pollard*, 96 Ky. 640, 29 S. W. 637.

**3. In Suits to Quiet Title.**—One who has held possession of land under such circumstances, and for such time, that he has thereby acquired a title by prescription or adverse possession, may call upon a court of equity to establish such title, and give him evidence thereof by entering a decree quieting his title against the person in whom the title appears to be vested. Considerations of public policy demand this, for the claim of title to lands can thus be found of record, instead of resting in parol, with all the incidental dangers and trouble in establishing it. A title by adverse possession will sustain a suit, even against the former owner, to have possession in the premises quieted, clouds removed from the title, and adverse titles and claims canceled or set aside: *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454; *Torrent Fire Engine Co. v. Mobile*, 101 Ala. 559, 14 South. 557; *Pacheco v. Wilson* (Ariz.), 18 Pac. 597; *Bachelder v. Baker*, 79 Cal. 226, 21 Pac. 754; *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202; *Mickey v. Barton*, 194 Ill. 446, 62 N. E. 802; *Boling v. Clark*, 83 Iowa, 481, 50 N. W. 57; *Independent Dist. v. Fagen*, 94 Iowa, 676, 63 N. W. 456; *Vallandigham v. Taylor*, 23 Ky. Law Rep. 1059, 64 S. W. 725; *Vier v. Detroit*, 111 Mich. 646, 70 N. W. 139; *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190; *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060; *McRee v. Gardner*, 131 Mo. 599, 33 S. W. 166; *Tourtellat v. Pearce*, 27 Neb. 57, 42 N. W. 915; *Buchanan v. Ray*, 2 Ohio St. 251; *Smith v. Montes*, 11 Tex. 24; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. Rep. 720; *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 3 Saw. 634, Fed. Cas. No. 4989. And this, although the adverse title has not been used to disturb the occupant: *Moody v. Holcomb*, 26 Tex. 714. The plaintiff in an action to quiet title may interpose the bar of the statute of limitations against a mortgagee defendant who seeks to foreclose a mortgage lien on the property: *Hogaboom v. Flower* (Kan.), 72 Pac. 547.

The holder of a title by adverse possession is entitled to all the remedies to quiet his possession that are incident to possession under written title: *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722. "We can see no reason why," says Justice Lord, "for all practical purposes, such a party's title should not be regarded, both in law and equity, as good as though he also had a perfect written title; and we are dealing with practical and not merely theoretical questions. If a party's right of possession has become absolute, has by long adverse possession ripened into what may as well and as properly, for practical purposes, be called title as anything else, so that he can maintain his possession, or recover it when ousted, or main-

tain all actions for injuries to it against the party having the written title, in all respects in the same manner, and to the same extent as against parties who never were other than entire strangers to the premises; if the party having the written title has lost, by adverse possession, all means of recovering or protecting possession when acquired without action, and all means of establishing or maintaining any right against the adverse possessor—we can see no good reason why such adverse possessor should be annoyed by pretended claims, or have the value of his possession diminished by an apparent title which has lost its vitality. We see no good reason why the party whose adverse possession has practically ripened into a title, should not be entitled to all the remedies to quiet his possession that are incident to possessions under written titles, which are in law and equity no more efficacious to protect the owners in the actual enjoyment of their possessions under them. Statutes of limitation are said to be statutes of repose. If so, they should be so construed and administered with respect to cases falling within their purview as to afford complete, not partial, repose”: *Parker v. Metzger*, 12 Or. 407, 7 Pac. 518.

**4. As a Good or Marketable Title Which Vendee Must Accept.**—Whether a title to real estate created by operation of the statute of limitations is a marketable title, as between vendor and vendee, is a question not unattended with difficulty. If a title acquired by adverse possession is a perfect title, and such it is said to be by the great weight of authority, then, in theory, it is a marketable title, and one which a vendee will be required to accept under a contract of sale. The cases so holding are numerous: *Tewkesbury v. Howard*, 138 Ind. 103, 37 N. E. 355; *Meibaum v. Brennan*, 49 La. Ann. 580, 21 South. 853; *Foreman v. Wolf* (Md.), 29 Atl. 837; *Rather v. Trustees of Church*, 85 Md. 528, 37 Atl. 24; *Ruess v. Ewen*, 54 N. Y. Supp. 357, 34 App. Div. 484, affirmed in 165 N. Y. 633, 59 N. E. 1130; *Kahn v. Mount*, 61 N. Y. Supp. 358, 46 App. Div. 84; *Hamerschlag v. Duryea*, 66 N. Y. Supp. 87, 31 Misc. Rep. 687; *Nelson v. Jacobs*, 99 Wis. 547, 75 N. W. 406. This presupposes, of course, that such title is clearly made out. A grantee will not be compelled to take title concerning the validity of which there is a reasonable doubt, when he has stipulated for a good one: *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527. *Holmes v. Woods*, 168 Pa. St. 530, 32 Atl. 54. But the mere possibility or suspicion of a defect is not enough to relieve him from liability under his contract: *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460.

Title by adverse possession may support a suit for the specific performance of a contract for the sale of land: *Ballou v. Sherwood*, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131; *Seymour v. Le Lancey*, 1 Hopk. Ch. (N. Y.) 436, 14 Am. Dec. 552; *Ruff v. Gerhardt*, 76 N. Y. Supp. 743, 73 App. Div. 245; *Miller v. Cramer*,



48 S. C. 282, 26 S. E. 657. Compare *Lewis v. Herndon*, 3 Litt. (Ky.) 358, 14 Am. Dec. 68. "It has been held both in England and America," it is said in *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460, "that a title by adverse possession may be so clearly proved and be so free from doubt as to be a proper foundation for a decree for specific performance against the purchaser," citing *Logan v. Bull*, 78 Ky. 607; *Gump v. Sibley*, 79 Md. 165, 28 Atl. 977; *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; *Ottinger v. Strasburger*, 33 Hun, 466, 102 N. Y. 692; *Pratt v. Eby*, 67 Pa. St. 396, 402; *Scott v. Dixon*, 3 Dru. & W. 388; *Gaines v. Bonnor*, 54 L. J. Ch., N. S., 517.

Title by adverse possession is sufficient to meet a contract for the sale of land, assuring to the purchaser a title which is marketable and free from doubt, together with the quiet and peaceable enjoyment of the property. And a purchaser under a contract requiring the seller to give a good and sufficient warranty deed, so as to convey the land in fee and unencumbered, is entitled to a good and marketable title merely, and is not entitled to a perfect record title: *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038. Compare *Thompson v. Dickerson*, 68 Mo. App. 535. But if a vendor agrees to convey a valid record title, a title by adverse possession does not fulfill his agreement: *Noyes v. Johnson*, 139 Mass. 436, 31 N. E. 767; *Zunker v. Kuehn*, 113 Wis. 421, 83 N. W. 605. It is unavailable to the vendor either to resist a suit for a rescission or to support a suit for specific performance.

While there is little doubt in our mind that a prescriptive title may be so clearly established as to bind a vendee to accept it, unless he has contracted for a record title, still, as a matter of fact, such a title, however perfect in theory, does not inspire the same confidence in a prospective encumbrancer, insurer, or purchaser, as a paper title. And this reluctance of a vendee will be given recognition by requiring the vendor to negative every reasonable objection to the title. Moreover, there is an obvious difference between regarding it as marketable and enforceable against a vendee in a proceeding in which the holder of an outstanding title, if such there be, is not a party, and holding it valid so as to constitute a defense to an action of ejectment. This is pointed out in *Simis v. McElroy*, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674, where a right of action for damages by a vendor against his vendee for the breach of an executory contract for the sale of land was denied. In the course of the opinion, Justice O'Brien said: "It is admitted that, as to a material part of the premises embraced in the contract, the plaintiff had no record title, but she claimed to have a good title by adverse possession, and the question presented by this appeal is whether the plaintiff established title in that way so conclusively as to warrant the court in directing a verdict in her favor. It is important to bear in mind that the

controversy is not between the party holding or claiming under the record title and the plaintiff claiming by adverse possession, but between the latter and a purchaser by executory contract to recover damages for his refusal to accept a title based entirely on such adverse possession. The holders of the outstanding record title, if any, are not parties to this action and cannot be bound by the judgment, and hence the defendant, if compelled to accept the deed tendered, might still be obliged to litigate with the true owners the question of title as against them. When the controversy assumes the form of an action of ejectment against the party in possession by one claiming under title by record, the former is in a stronger position to assert his right than when litigating with a stranger who refuses to accept his title. In the former case, adverse possession is evidence of title in the party asserting it. It might well be held to have the same effect in every case but for the difficulty, if not the impossibility, of establishing the fact as against those who are not parties to the action or bound by the judgment. In such cases, it is frequently very difficult for courts to anticipate what the owner of the outstanding title may be able to prove in a litigation with a party who has taken a title by adverse possession. The former may be able to prove facts tending to show that what appeared to be an adverse possession, in a litigation in which he was not heard, is quite otherwise, and hence this court has frequently refused to compel a purchaser to take a title which he may be called upon to defend, by parol proof of adverse possession." To the same effect, see *Zunker v. Kuehn*, 113 Wis. 421, 88 N. W. 605, where a prescriptive title was held insufficient to resist a suit by a vendee for a rescission of the contract of sale.

5. **As a Support to Damages in Eminent Domain.**—In a proceeding to assess damages for the construction of a highway, if the defendant has a prescriptive title, whether or not he has a valid record title is immaterial: *Hohl v. Osborne* (Iowa), 92 N. W. 697. Such title will support an action for damages for injury done to the property from the improper construction of a railroad adjacent to it: *Swenson v. Lexington*, 69 Mo. 157.

6. **As a Support to Action for Trespass or Injuries.**—The adverse possession of land for the statutory period confers a title which will defeat an action for trespass: *Terry v. Hilton*, 20 Ky. Law Rep. 367, 46 S. W. 216; and which will, on the other hand, support an action for trespass and an injunction against further trespasses: *Coppage v. Griffith*, 19 Ky. Law Rep. 459, 40 S. W. 908; *Hart v. Doyle*, 128 Mich. 257, 87 N. W. 219. In *Montgomery v. Robinson*, 4 Del. Ch. 490, an injunction against the erection of a wall on the premises was granted. Such a title will enable the occupant to recover from a railroad company for damages suffered by its starting a fire on the land: *Busby v. Florida Cent. etc. R. R. Co.*, 45 S. C. 312, 23 S. E. 50.

## SMITH v. INGRAM.

[132 N. C. 959, 44 S. E. 643.]

**CONFLICT OF LAWS.**—The Transfer of Realty is governed by the laws of the state where it is situated. (p. 681.)

**CONFLICT OF LAWS**—Covenant of Warranty, Difference Between Asserting as an Estoppel and a Cause of Action.—Where it is claimed that a covenant of warranty operates as an estoppel affecting the title to land, it must be governed by the law of the state wherein the land is situated, and if not valid by the law of that state cannot be enforced as an estoppel. (pp. 681, 682.)

**A MARRIED WOMAN'S DEED** Containing a Covenant of Warranty, if not executed in conformity with the laws of the state wherein the land attempted to be conveyed is situated, cannot there operate by way of estoppel, so as to prevent her from claiming such land, though the conveyance was executed in the state wherein she resided and in accordance with its laws, and would have been valid had it related to her real property in that state. (p. 682.)

**THE CONVEYANCE of a Married Woman Cannot Operate Against Her by Way of Estoppel** where, because not executed in conformity with the statute, it cannot operate directly as a conveyance. (p. 683.)

**A COVENANT OF WARRANTY** Does not Pass to the Grantee of the Grantee without an express assignment, where the conveyance in which it is contained is as such void. (p. 683.)

**A MARRIED WOMAN** is not Estopped from Asserting the Invalidity of a Conveyance of her real property not executed in the mode required by statute, though she has received a valuable consideration and her vendee has been let into possession and has made valuable improvements. (p. 684.)

Action by Mrs. Smith against Ingram and others for the recovery of certain lands and damages for their detention. The defendants pleaded that the plaintiff and her husband made a conveyance of the lands on the 21st of January, 1878, to one Lindsay Hursey with covenants of warranty; that Hursey took possession of the land and claimed to hold it under this conveyance, and that the defendants claimed and are entitled to possession through conveyances from and under Hursey. The trial court gave judgment for the plaintiff; the defendants appealed. An opinion was given by the supreme court affirming the judgment. This opinion was written by Chief Justice Furches, Justice Douglas concurring, but declaring that he did so with reluctance on account of the great and unmerited hardship inflicted upon many individuals. Chief Justice Clark dissented.

Adams, Jerome & Armfield, for the petitioner.

McIver & Spence, Douglass & Sims and J. A. Spence, in opposition.

**960** WALKER, J. This is a petition to rehear the above-entitled case which was decided at February term, 1902, and is reported in *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984. On the twenty-first day of January, 1878, the plaintiff being the owner of the land in controversy, which is situated in this state, joined with her husband in the execution of an unsealed paper-writing by which they professed to convey the said land for a consideration received by her to one Lindsay Hursey, who afterward conveyed to the defendant, A. Leach. The other defendants claim their shares in the land by mesne conveyance from Leach.

At the time of executing the paper-writing to Hursey the plaintiff and her husband were citizens of the state of South Carolina and were domiciled in that state, and Hursey was a citizen of this state and domiciled therein. The paper-writing was proved by witnesses, there being no acknowledgment of it or privy examination of the wife. There was a general covenant of warranty in the deed. By the constitution and laws of South Carolina, in force at the time the paper-writing was executed, a married woman could purchase and convey real property as if she were unmarried, and her deed to the same could be proved by witnesses without privy examination and when thus proved and registered was binding upon her. The plaintiff's husband died since this suit was brought.

It may be assumed that if the lands had been situated in South Carolina the paper-writing executed by the plaintiff to Lindsay Hursey was valid and effectual for the purpose **961** of passing the land to the latter, and further that the plaintiff according to the laws of that state would be bound by the covenant of warranty. But as the land is situated in this state, the transfer of it must be governed by our law. It seems to be conceded that the title to the land did not pass by the mere force and operation of the deed as a conveyance, but the defendants contend that the plaintiff is estopped by the deed and especially by the covenant of warranty to claim the land, as her covenant is valid and binding on her under the laws of South Carolina where she resided and had her domicile at the time she entered into it.

There is a marked difference between the validity of a covenant of warranty where the question is whether the covenantor is liable in damages for a breach of the covenant, treated as a mere personal contract, and its validity for the purpose of creating an estoppel against the covenantor to claim the land



which he had sold and conveyed and the title to which he has warranted. In the one case, the remedy is by an action on the covenant which sounds only in damages, and in the other the covenant is considered, not as passing the estate, if we speak with technical accuracy, but as concluding the party, who has affirmed that he had the title at the time of the conveyance and has agreed to warrant and defend it, from afterward disputing that fact, or from asserting a title in opposition to the one he professed to convey, but while the estoppel may not have the legal effect of transferring the title to the covenantor, it indirectly accomplishes that result. Whatever may be the rule with reference to the law governing the validity of a covenant considered as a personal contract, for the breach of which damages may be recovered, whether it is the law of the place where the property with reference to which the covenant is made is situated, or the law of the place of the contract, we need not decide in this <sup>962</sup> case, for it is sufficient for the purpose of this appeal to hold, as we must, that if the covenant is to be regarded as an estoppel affecting the title, it must be governed by the law of the state where the property is situated, and in this case by the law of this state: *Minor's Conflict of Laws*, sec. 185; *Riley v. Burroughs*, 41 Neb. 296, 59 N. W. 929; *Hill v. Shannon*, 68 Ind. 470; *Tillotson v. Pritchard*, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302. Referring to this very question of the effect of a covenant of warranty, the court, in *Succession of Larendon*, 39 La. Ann. 952, 3 South. 219, says: "The rights and obligations arising under acts passed in one state to be executed in another, respecting the transfer of real estate in the latter, are regulated in point of form, substance and validity, by the laws of the state in which such acts are to have effect." The rule is said by the court to apply also to the determination of liability upon the covenant for damages.

If the question of estoppel is to be decided by the law of this state, as we hold it must necessarily be, it follows that it cannot have the effect, either directly by passing the estate or indirectly by concluding the plaintiff of preventing her recovery in this case. A ruling which would give to the covenant the force and effect the defendants contend it should have would be in flagrant violation of the spirit and letter of our law in regard to the transfer of real property by married women. We will always in comity enforce the laws of another state, when the rights of the parties should be determined according to the place where the contract was made, or where the transactions,

out of which those rights arose, took place: but we cannot enforce the laws of a foreign jurisdiction when they conflict with our own laws in a matter concerning property situated in this state. If we should say that the covenant works an estoppel which concludes the plaintiff and thereby divests her of the title to the property, we would decide in effect that she had done indirectly what she could <sup>963</sup> not do directly. "The wife cannot subject her separate real estate or any interest therein to any lien except by deed in which the husband joins, with privy examination as prescribed by law, and she will not be allowed to do indirectly what the law prohibits her doing directly": *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460. In *Duwry v. Foster*, 2 Wall. 34, the court says: "To permit an estoppel to operate against her (a married woman) would be a virtual repeal of the statute which extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyance of the real property of feme covert."

The defendants cannot avail themselves of the covenant, because it was not made directly with them but with Hursey and there has been no assignment of the covenant by him to them. It is true that a covenant of warranty is in the nature of a real covenant and runs with the land, even though the word "assigns" is not mentioned therein: *Wiggins v. Pender*, 132 N. C. 628, 44 S. E. 362, at this term. But the defendants can take nothing by this principle as the deed of the plaintiff was absolutely void, and the land, or, more properly speaking, the title or estate, did not pass, and of course the covenant cannot be said to have passed to the defendant with the land. The covenant of warranty is incident to the estate, and as the defendants acquired no estate it follows that they derived no advantage in any way from the covenant: *Kercheval v. Triplett*, 1 A. K. Marsh. (Ky.) 493. If it is a binding covenant at all it is nothing more than a covenant in gross or one detached from the land, and could not have passed to the defendants except by an assignment. When the deed of a married woman fails as a conveyance because of the nonjoinder of her husband or for any other reason, it is ineffectual for all purposes and cannot be relied upon as an estoppel or ground for recovery <sup>964</sup> in any subsequent controversy: *Herman on Estoppel*, sec. 581. In *Lowell v. Daniels*, 2 Gray, 168, 61 Am. Dec. 448, the court, discussing this question, says: "She can make no valid

contract in relation to her estate. Her separate deed of it is absolutely void. Any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seised in her own right and had full power to convey, such covenant would avail the grantee nothing. She could neither be sued upon them nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith and for full consideration, cannot affect her interest in the estate or that of the husband and children": See, also, *Pierce v. Chase*, 108 Mass. 254. In *Harden v. Darwin*, 77 Ala. 481, it is said by the court: "It has been uniformly held that a married woman is not estopped from asserting the invalidity of a conveyance of her property, not executed in the mode required by the statute, though she has received a valuable consideration, and her vendee has been let into possession; and that a court of equity will not enforce it against her, as an agreement to convey": *Louisville etc. Ry. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303, 29 S. W. 14. The covenant binds the covenantor to warrant and defend the title which passes by the deed and to answer in damages if the title fail or proves defective. It relates to the title or estate of the covenantor, which he undertakes to convey and not to the validity of the deed by which it is transferred. The purchaser is presumed to know that a married woman is not bound by a deed without her privy examination, and if he takes a conveyance imperfectly executed or acknowledged by her, it is his own misfortune if not his fault: *Towles v. Fisher*, 77 N. C. 437. We think the principles laid down in this court in *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706, are conclusive against the defendants <sup>965</sup> in this case. While the precise question we are discussing was not involved in that case, it affords a perfect analogy for our guidance and is sufficient in all respects to sustain our decision on this rehearing. In the case of *Collins v. Benbury*, 25 N. C. 285, 38 Am. Dec. 722, it was held by this court that a conveyance which failed to pass the land and was merely void could not operate as an estoppel, and this must needs be so.

The defendants further contend that plaintiff is estopped by her act in permitting Hursey and the defendant to take possession of the land and make valuable improvements thereon. We have not been able to find anything in the record upon which they can base this contention, but if there were facts

sufficient for that purpose, we would be unable to agree with the defendant. A married woman is no more estopped by her acts in pais than by her covenant of warranty. This court has said that no one can reasonably rely upon the acts and representations of a married woman, at least those which are contractual in their nature, as he must know that she is not bound thereby, and "it is only in the case of a pure tort, altogether disconnected with the contract that an estoppel against her can operate": *Towles v. Fisher*, 77 N. C. 438; *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694; *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706; *Carolina Cent. R. R. Co. v. McCaskill*, 94 N. C. 746.

We have examined with care the authorities to which our attention has been called and do not think that they support the contention of the petitioner as to the estoppel arising from the covenant of warranty. We make special reference to two of them. In the case of *Long Island R. R. Co. v. Conklin*, 29 N. Y. 587, the question as to the valid execution of the deed was not raised, but the point was whether the words of the deed were sufficient to operate as a conveyance of the property, and the court held that if they were not resort could be had to the <sup>966</sup> covenant of warranty as containing sufficient words for that purpose. The grantor was *sui juris*. In *Basford v. Pearson*, 7 Allen, 504, there was no reference to an estoppel as the action was brought to recover damages for a breach of the covenant. The question in our case is not whether Mrs. Smith is liable for damages upon the covenant, but whether she is estopped from claiming the land.

We have given this case most anxious thought and consideration not only because of the interesting and important questions involved, but because of the great hardship and apparent injustice the defendants may suffer as the result of our decision based upon the application of fixed legal principles to their case.

Whether the defendants can have equitable relief is a question not now before us for adjudication. Such relief has been granted in a case closely resembling this in its facts and circumstances. In that case the court fully recognized the invalidity of a deed executed by a married woman and based its decision upon the ground that the right to equitable relief or to compensation for improvements to the extent that they had enhanced the value of the land did not involve the enforcement



of a contract either directly or indirectly, but simply denied to her the use and enjoyment of property for which she had paid nothing and which she acquired by the repudiation of her deed; *Preston v. Brown*, 35 Ohio St. 18. Whether this is a correct principle and the case just cited and others of a like tenor are in accord with our decisions and should be followed by us is a question which, if it should ever arise, we will leave open for future consideration and entirely free from any expression or even intimation of opinion by us.

However much we may regret the unfortunate situation of the defendants we cannot grant them any relief as the matter is now presented without abrogating well-settled principles and violating the plain provisions of our statute, the enforcement <sup>967</sup> of which is obligatory upon us. After careful examination of the case we can find no error in the former decision of this court.

Petition dismissed.

**Chief Justice Clark** again expressed his dissent, referring to, without repeating, the views expressed by him at the former hearing and also to the opinion of the court in *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418; *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138, the concurring opinion in *Vann v. Edwards*, 128 N. C. 425, 39 S. E. 66, and the dissenting opinion in *Williams v. Walker*, 111 N. C. 613, 16 S. E. 706. He claimed that the provisions of section 6 of article 10 of the constitution of the state and chapter 78 of the Laws of 1899 took women out of the class of incompetents "and from the companionship 'of infants, idiots, lunatics, and convicts' in which they had been placed by the statute of limitations," and, at all events, if the plaintiff was held to be entitled to recover back her land, justice and equity required that she should pay for the betterments placed thereon and render compensation for its enhanced value. In the dissenting opinion of the chief justice which appears in *Smith v. Ingram*, 130 N. C. 108, 40 S. E. 987, he declared that "the contract of conveyance and the contract of warranty of title were valid in South Carolina; where made, and being valid there, are valid everywhere else"; and that the personal contract must be enforced everywhere if valid where made; that a covenant of warranty by a married woman which is good as a personal contract is enforceable, though the deed is void as a conveyance in the state where the land is: *Long Island R. R. Co. v. Conklin*, 29 N. Y. 587; that it had been held in *Basford v. Pearson*, 89 Mass. 504, that a deed executed by a married woman residing in Massachusetts for her lands in New Hampshire, if properly executed according to the laws of the former state, though not ac-

according to the laws of the latter, estopped her by the covenant of warranty contained therein; and that "a married woman is estopped by her covenant of warranty in all cases where she is competent to contract according to the laws of the place of contract": Citing Harris on Contracts of Married Women, sec. 318; Kolls v. Dleyer, 41 Barb. 208; Richmond v. Tibbels, 26 Iowa, 474; Zimmerman v. Robinson, 114 N. C. 39, 19 S. E. 102; Alexander v. Davis, 102 N. C. 17, 8 S. E. 768; Newhart v. Peters, 80 N. C. 166; Armstrong v. Best, 112 N. C. 59, 34 Am. St. Rep. 73, 17 S. E. 14; Robinson v. Queen, 87 Tenn. 445, 10 Am. St. Rep. 690, 11 S. W. 38.

The judge further insisted that if the covenant of warranty in the deed were not sufficient to estop the plaintiff from claiming the land, an estoppel in pais had arisen against her on the receipt of the purchase money and putting the purchaser into possession, and the standing by while the defendants claiming under the purchaser had held possession ever since 1878, and built upon and improved the property. Furthermore, that the plaintiff had contracted with Hursey by a perfectly valid and binding contract that she would warrant and defend the title. The judge finally concluded by saying: "If there is any precedent anywhere which can be construed to countenance the plaintiff's recovery, there is no better time to repudiate it than now. A precedent so mischievous and subversive of every element of natural justice should not be left standing, upon which to ask the judgment of a court, which will work such an injustice. In the very recent case of Thompson v. Taylor, 66 N. J. L. 253, 88 Am. St. Rep. 485, 49 Atl. 544, decided by the highest court of New Jersey, that court holds, reversing the supreme court of that state, that where a married woman domiciled in New Jersey executes a note to her husband, invalid in New Jersey, which is taken by her husband, with her acquiescence, to New York, and there indorsed by him and delivered, this became a New York contract, and such contract, being valid in New York, the liability of the wife will be enforced in New Jersey. This case is much stronger than ours, and is a full discussion by a very able court showing how completely the doctrine of the legal nonentity and legal incapacity of women is now discredited even in those states whose laws still retain some trace of it. Precedents, even when unbroken and admitted, are not to be preferred or continued when they work a plain and undeniable wrong."

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*Conflict of Laws* as affecting the rights and obligations of married women is the subject of a monographic note to Locke v. McPherson, 85 Am. St. Rep. 552-578. See, also, the subsequent cases of Baer Bros. v. Terry, 108 La. 597, 92 Am. St. Rep. 394, 32 South. 353; Brown v. Dalton, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443; Thompson v. Taylor, 66 N. J. L. 253, 88 Am. St. Rep. 485, 49 Atl. 544; Union Nat. Bank v. Chapman, 169 N. Y. 538, 88 Am. St. Rep. 614, 62 N. E. 672.

*Estoppel Against Married Women* is the subject of a monographic note to *Trimble v. State*, 57 Am. St. Rep. 169-185. And see the subsequent cases of *Shew v. Call*, 119 N. C. 450, 56 Am. St. Rep. 678, 26 S. E. 33; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411; *German Ins. Co. v. Bartlett*, 188 Ill. 165, 80 Am. St. Rep. 172, 58 N. E. 1075; *Threefoot Bros. & Co. v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39, 30 South. 513, on their estoppel to assert title to real estate.

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## STATE v. JONES.

[132 N. C. 1043, 43 S. E. 939.]

**HUSBAND AND WIFE—Trespass by Him on Her Lands.**—A wife, though she has separated from her husband under the justifiable belief that he is living in adultery, cannot maintain a prosecution against him for trespass in entering upon and refusing to leave her lands, constituting her separate real property, though she has ordered him to leave and not to again enter. (p. 690.)

Action against Albert Jones. Plea of not guilty on a special conviction. The state appealed.

Robert D. Gilmer, attorney general, for the state.

No counsel for defendant.

**1043 MONTGOMERY, J.** The wife of the defendant, who was the owner of the premises on which they resided up to November, 1892, left on that day and has remained off ever since, having good grounds for believing that the defendant had been for sometime living in adultery with a woman in the neighborhood. She had, before she left her home, urged upon the defendant to leave her premises that she might live there alone, and he refused to do so. The defendant had been living on the land all the while, although shortly after having left herself she ordered the defendant to leave and not to enter again. Upon his frequent ingress and egress and refusal to leave a warrant was issued for entering upon the land after being forbidden. He was found guilty in the <sup>1044</sup> court of a justice of the peace and fined. From that judgment he appealed to the superior court. The above facts were found by a special verdict in the superior court, and upon them the court adjudged that the defendant was not guilty.

We can see no error in the judgment. Notwithstanding the fact that the wife may have good grounds to suspect the de-

fendant husband of immoral conduct, they are still in the eye of the law husband and wife, and there has been no separation by a decree for a divorce a mensa et thoro. This case presents the novel feature of a wife seeking a judicial separation from her husband by the criminal action of trespass.

In *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324, the husband and wife occupied the same house and farm, the property of the wife, and the action by the wife against the husband was an action of ejectment. He had taken possession of the property, was using it as his own, and had been appropriating the rents and profits to his own use without applying any part of the same to the wife's comfort and support. This court held that the wife was entitled to an order for the possession of the property, but that the husband could not be ejected from the premises, for that was "a proposition fraught, as I conceive, with the most dangerous consequences to society, to wit, that a wife may under the forms and with the sanction of law, at her own will and without cause, eject her husband from her dwelling and society because the house is her separate property. I can never agree that either husband or wife can, without committing those offenses which the law designates as causes of divorce or separation, invoke the aid of the courts to render a judgment, the unavoidable consequences of which would be a separation of man and wife. Nothing less than an express or positive statute to that effect can control or destroy the highest of <sup>1045</sup> all the obligations imposed in the marriage relation—that man and wife shall live together. Any decision of the courts, the direct or incidental result of which is to destroy the sanctity of marriage in that particular, can but weaken and undermine the surest foundations upon which the structure of society and through it of political institutions rest, and command our confidence." The court further said: "By the matrimonial contract the husband and wife are to live together, and the law, divine as well as human, has, whether wisely or unwisely, made him the ruler of the household, and the well-understood and well-defined legal duties, relations and obligations of the marriage compact cannot be abridged or changed at the will of either, or otherwise, or for other causes than are prescribed in the statute in relation to divorce and alimony." In that case the parties were occupying together the premises, but does the fact in the present case that the wife has abandoned her husband and their home and made her resi-



dence elsewhere alter the principle involved in the case from which we have just quoted? Are not the purpose and effect of the present action, if successful, the separation of the husband and the wife and the destruction of the home relations? Can it be that a wife may, whenever she sees fit leave her home and take up her residence in another place, refuse the society of her husband and indict him as a trespasser if he puts his foot upon the wife's abandoned property, the place he has made his home? Have we reached that stage of social progress when the sacred relation of husband and wife and the hallowed influences of the home are converted into mere traditions without power to influence, and dreams instead of relations? It would seem so to us if we were to hold that the indictment in this case was lawful and proper.

If the husband should commit any of those acts which the 1046 law points out as causes of divorce, the wife may effect a separation from him under the chapter of the Code on Divorce and Alimony, and only in that way. The case of *Taylor v. Taylor*, 112 N. C. 134, 16 S. E. 1019, does not have application to the facts of this case. There, the plaintiff who was the wife of the defendant brought an action against him to recover possession of her land and for an injunction to restrain him from interfering with her exclusive control and management of her property. The court said: "The plaintiff is entitled to the possession of the land, exclusive of the husband, until a reconciliation has been effected." But the parties had been divorced *a mensa et thoro*.

No error.

**Chief Justice Clark Dissented.** He relied on the provisions of section 6 of article 10 of the constitution of the state, declaring that the property of every female, whether acquired before or after marriage, "shall be and remain the sole and separate property of such female." He declared that since the adoption of that provision it had been uniformly held that it decreed to a wife the complete ownership and control of real property as if she were unmarried, and that the permitting a husband to occupy the property of his wife might well prevent her from getting a tenant and from exercising the complete control and ownership of it guaranteed to her by the constitution, that the utmost that could be held with proper regard to this constitutional provision was "that when the wife is residing upon the premises, the husband has the right of ingress to her and egress, because of his marital right to enjoy her society, but when, as here, the wife does not reside upon the premises, but has purposely removed therefrom to prevent his

coming there, there is no right of ingress and egress to her. He has no right *jure mariti* to occupy the residence when she left it permanently, or to enter upon any of her lands (save to come to her when there) if forbidden by her so to enter." He further added:

"In the present case the wife cannot have a divorce though the husband is living in open adultery, because he has not 'abandoned her and lived in adultery as our statute requires' (*House v. House*, 131 N. C. 140, 42 S. E. 546), but for good cause, as the jury finds, she has left him. If therefore she cannot forbid him to go upon her separate property and to live there in her absence, she has lost that absolute control of her property, as she had it before marriage and which a constitutional provision guarantees shall remain in her after marriage. If she can not forbid him to go there, she cannot ask a court to forbid his doing so, and his character and conduct may, and doubtless would, prevent her getting a tenant for that tract of land. What self-respecting tenant would share the house with the husband and his paramour? Besides if he has a right to occupy the house at all as husband he has a right to the whole of it. But the constitution forbids him any right of his wife's property. In *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 524, it was held that he had the right of ingress and egress, to the wife's presence, though not to any dominion over her land or occupancy of the house except in conjunction with her.

"But even the right of access to her person, if contrary to her will, has since that decision been denied though there was no divorce, in the famous *Clitheroe* case (*Regina v. Jackson* (1891), L. R. Q. B. Div. 671), by a unanimous bench in the court of appeals in England, Lord Chancellor Halsbury, Lord Esher, master of rolls, and Fry, L. J., delivering opinions. That case attracted the attention of lawyers throughout the world, and has been generally accepted as settling the right of a married woman to be free as to her person, as well as her property, from the control of her husband, unless she is willing to his companionship. He can sue for divorce if his own conduct so entitles him.

"As the wife cannot by *habeas corpus* compel the husband to abide with her, so it was held in the *Clitheroe* case that the husband could not enforce the unwilling companionship of the wife. The law now recognizes the equality of rights of both parties to the marital relation, and no longer asserts the inferiority or subjection of women. The question here involved is not the propriety of husband and wife living together, notwithstanding he is living in adultery with another woman. The husband and wife are not living together, and there is no process by which the courts can make her live with him. It is not an issue of divorce but of property rights. The sole question is, Can the husband infringe upon the wife's right to have the sole custody of her property which the constitution has guaranteed to her, or can the courts disregard that guar-

anty because man and wife ought to live together? Is there any higher law than the constitution? Besides the husband occupying the wife's property in her absence and against her prohibition is not living with her, even constructively.

“Certainly as the wife was not living on this property, the husband had no right to go there and occupy the house against the prohibition of the owner. He had no interest in the property. The wife has sole right to control it and as fully as if she had remained single.”

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*The Separate Property of Married Women* as affected by American statutes is considered in the monographic note to Kirkpatrick v. Buford, 76 Am. St. Rep. 367-401. Such statutes do not deprive the husband of his power and authority as head of the family, nor render him any the less accountable for the economy and administration of the household: Strouse v. Leipf, 101 Ala. 433, 46 Am. St. Rep. 122, 14 South. 667. It has been held that a husband is not guilty of arson in burning a house which his wife owns and they both occupy: Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302. And it has also been decided that, while a woman may maintain ejectment against her husband to recover her land, still his marital right of occupancy cannot be impaired, and his right of ingress and egress to the dwelling and society of his wife continues: Manning v. Manning, 79 N. C. 293, 28 Am. Rep. 324.

CASES  
IN THE  
SUPREME COURT  
OF  
NORTH DAKOTA.

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DRINKALL v. MOVIUS STATE BANK.

[11 N. Dak. 10, 88 N. W. 724.]

**NEGOTIABLE INSTRUMENTS.**—Cashier's Checks are not subject to countermand like ordinary checks, the relations of the parties to a cashier's check are similar to those of the parties to a negotiable note payable on demand. (p. 696.)

**NEGOTIABLE INSTRUMENTS — Indorsement — Unlawful Consideration.**—The title of an indorsee of a negotiable note is defective when the consideration for the indorsement is unlawful, or where such indorsement is procured by illegal means. (p. 700.)

**NEGOTIABLE INSTRUMENTS — Indorsement — Gambling Consideration.**—Indorsement and delivery of a negotiable instrument by the payee to a gambler in payment of a gambling debt does not make the latter a holder for value in due course of business, and his title so acquired is defective where gambling is prohibited by statute. (p. 701.)

**NEGOTIABLE INSTRUMENTS—Payment as Discharge.**—Payment of a negotiable instrument to effect a discharge must be made to the rightful holder or his authorized agent, and generally payment to one who holds under a blank indorsement is valid as against other parties, if made in good faith and in ignorance of all facts impairing the holder's title. (p. 702.)

**NEGOTIABLE INSTRUMENTS—Illegal Consideration for Indorsement—Notice.**—If an indorsement of a negotiable instrument is for an illegal consideration, such as a gambling debt, payment made to the indorsee after notice of that fact is no defense against the indorser. (p. 702.)

**NEGOTIABLE INSTRUMENTS—Payment After Notice of Defective Title.**—Payment of a negotiable instrument by the maker to one who claims to be a bona fide holder, is not sufficient to protect the former against the claim of the real owner, when made after notice of defective title in the holder. (p. 702.)

Purcell & Bradley, for the appellant.

Freerks & Freerks, for the respondents.



<sup>12</sup> YOUNG, J. The plaintiff in the action, John Drinkall, seeks to recover from the defendant, the Movius State Bank, a state banking corporation organized under the banking laws of this state, and doing business in the village of Lidgerwood, the sum of two hundred dollars and interest, as due and unpaid, on a certain cashier's check or certificate of deposit issued by the defendant to the plaintiff on the eighteenth day of December, 1899. The defense interposed is payment to the holder and owner thereof in due course of business. The case was <sup>13</sup> tried to a jury, and a verdict returned for plaintiff for the full amount claimed. Defendant moved for a new trial. This was denied, and judgment was entered on the verdict. The defendant appealed from the judgment, and assigns for review in this court the same errors which were relied upon in the trial court in its motion for a new trial.

The complaint, in substance, alleges that on the eighteenth day of December, 1899, the plaintiff deposited with the defendant bank in Lidgerwood the sum of two hundred dollars; that the defendant issued therefor and delivered to plaintiff its certificate of deposit or cashier's check, dated on that day, and payable to plaintiff on demand; that on the thirtieth day of December thereafter he duly demanded of defendant the payment of the sum of two hundred dollars represented by said certificate of deposit or cashier's check; that defendant refused, and still refuses, to pay the same, and has not paid the same, or any part thereof. The complaint further alleges that after receiving said check, and on the same day he went to the place of business of Ralph Maxwell and William Van Dorn, in Lidgerwood, where he became intoxicated, and while so intoxicated he was induced by said Maxwell and Van Dorn to gamble and take part in a game of chance played by means of an instrument known as a "roulette wheel"; that he played at said game of chance and wagered large sums of money thereon; that for the purpose of playing the same was induced to indorse and did indorse the check in question, and delivered the same to the said Maxwell for the purpose of paying money lost by plaintiff, and claimed to have been won by said Maxwell and Van Dorn, in said gambling transaction; that on the following day, to wit, December 19, 1899, and prior to the presentation of said check to defendant for payment, the plaintiff notified the defendant of the facts in reference to the loss of said check and of the possession thereof by Maxwell and Van Dorn, and instructed said defendant not to pay the same when presented.

The answer admits the deposit of money by plaintiff, and the issuance of the cashier's check as alleged in the complaint, but by a denial places in issue the facts as to the loss and notice of loss of the check alleged in the complaint and alleges that "said cashier's check was, on or about the nineteenth day of December, 1899, presented to the defendant in the usual course of business for payment, by the then holder and owner of said check, properly indorsed by the signature of the plaintiff upon the back of said check, and was, by said defendant, in the usual course of business, paid to the holder of said check." This appeal presents for review the order overruling defendant's motion for a new trial, which involves a consideration of the grounds upon which the motion was based. The errors specified in the statement of case on which the motion was made are eighteen in number. They need not be discussed separately. So far as they are important to a review of the order denying the motion for a new trial they are disposed of by our conclusion on the questions which we shall hereafter discuss.

Before taking up the consideration of the questions presented by <sup>14</sup> the assignments of error, a brief statement of facts is necessary. It is established by undisputed evidence that on the eighteenth day of December, 1899, the plaintiff, Drinkall, deposited in the defendant bank in Lidgerwood the sum of two hundred dollars, and received therefor the cashier's check in suit, which check was signed by the assistant cashier of the bank, drawn on said bank, and made payable in terms to the plaintiff. Thereafter, in the evening of the same day, Drinkall went into a gambling-house in Lidgerwood, which was operated by Ralph Maxwell and William Van Dorn, which is known in the record as "Maxwell's Blind Pig," where he drank sufficient liquor to render him intoxicated, and while so intoxicated he was invited into a rear room in the building by Van Dorn, and there engaged in the gambling game operated by the gambling device known as a "roulette wheel." When he entered their place of business, he had in his possession twenty-eight dollars in money and the cashier's check in question. During the progress of the game he exchanged his ready cash for chips and when they were exhausted, which was at about 11 o'clock P. M., at the request of Van Dorn, he signed his name upon the back of the check in question, and delivered the same to Maxwell in exchange for more chips and some money to be used in playing said game. At 2 o'clock in the morning Drinkall was without money, check or chips. The wheel was stopped, and Drink-

all, whose condition was unsteady from frequent libations during the progress of the game, was, at Maxwell's request, given another drink, and led upstairs, and put to bed. Before doing this, Maxwell had him again write his name on the check, his former signature not being satisfactory. On the morning of the nineteenth, Maxwell presented the check at the bank's office, duly indorsed by himself, and the same was paid in full by the defendant. As to the foregoing facts there is no controversy. They establish the deposit by plaintiff, the issuance to him of the check in question, the transfer of the check by indorsement to Maxwell and Van Dorn in a gambling transaction, and the payment of the same to said Maxwell by the defendant.

One of appellant's contentions is that "the evidence is insufficient to show that the bank had knowledge or notice of sufficient facts to put it on inquiry as to the invalidity of plaintiff's indorsement of the cashier's check or of the illegality or insufficiency of the consideration upon which such indorsement was made," and that, therefore, it was error to deny the motion for a new trial on this ground alone. Before referring to the evidence as to notice to the defendant, it is important to determine the legal rights and obligations of the parties to the instrument, and with that end in view we will consider in order (1) the character of the cashier's check upon which the plaintiff bases his cause of action, (2) the legal effect of the indorsement made in the gambling transaction, and (3) the duty of the defendant as to payment of the cashier's check.

A cashier's check, so-called, differs radically from an ordinary check. The latter is merely a bill of exchange drawn by an individual <sup>15</sup> on a bank, payable on demand; or, in other words, it is an order upon a bank purporting to be drawn upon a deposit of funds, for the payment of a certain sum of money to a person named, or to order or bearer, on demand. As between himself and the bank, the drawer of the check has the power of countermanding his order of payment at any time before the bank has paid it, or committed itself to pay it: 5 Am. & Eng. Ency. of Law, 2d ed., 1079, and cases cited. When the check, however, is certified by the bank, the power of revocation by the drawer ceases, and the bank becomes the debtor: 1 Morse on Banks and Banking, secs. 398, 399. A cashier's check is of an entirely different nature. It is a bill of exchange, drawn by the bank upon itself, and is accepted by the act of issuance; and, of course, the right of countermand, as applied to ordinary checks, does not exist as to it: 2 Randolph

on Commercial Paper, 588; 1 Daniel on Negotiable Instruments, 444; 1 Parsons on Notes and Bills, 288. The bank, in such case, is the debtor, and its obligation to pay the cashier's check is like that of the maker of any other negotiable instrument payable on demand. As applied to the case under consideration, the rights and obligations of the plaintiff and defendant as to the cashier's check in question were those of a payee and maker of a negotiable promissory note payable on demand.

What was the legal effect of plaintiff's indorsement, being based upon a gambling transaction? The solution of this question, under the authorities, is difficult, by reason of the difference in statutes on the subject, and also because of the conflict in the common law, both in England and in the United States. At early common law in England, gambling contracts, when fair and free from cheating, were assumed by the courts, without discussion, to be valid. Later the courts were disinclined to entertain actions based on gambling contracts; but still later they returned to the original rule that such contracts were valid and actionable, excepting therefrom, however, certain classes of wagering contracts. In the United States, in a number of the states it is held that the common law of England upon gambling contracts is unsuited to the conditions and institutions, and that all gambling contracts are void by their common law. In others it is held that the English statutes against gambling passed prior to the American revolution are in force in their jurisdiction as common law, or as adopted by statute in general terms. Still another class of states hold that the common law of England on the subject of gambling contracts is in force, and that gambling contracts not of the forbidden classes are valid, and enforceable by their common law: See cases cited in 14 Am. & Eng. Ency. of Law, 2d ed., 586, 590. In Illinois, under the peculiar statute of that state, it has been held that an indorsement of commercial paper on a gambling consideration is void, and, although in the hands of an innocent holder for value, the legal consequence of such an indorsement is of no more effect than a forged indorsement: *Chapin v. Dake*, 57 Ill. 295, 11 Am. Rep. 15; and the property in the instrument remains in the payee unaffected <sup>16</sup> by such indorsement: *Commercial Nat. Bank v. Spaid*, 8 Ill. App. 493. So also, under the statutes of Mississippi declaring all gambling contracts utterly void, the maker of a note payable to an in-



dividual named or bearer, when sued by another than the party named as payee, may successfully defend by showing that the plaintiff won the note on a wager: *Holman v. Ringo*, 36 Miss. 690; *McAuley v. Mardis*, Walk. 307; *Adams v. Rowan*, 8 Smedes & M. 624; *Lucas v. Ward*, 12 Smedes & M. 157; *Martin v. Terrell*, 12 Smedes & M. 571; *Smither v. Keys*, 30 Miss. 179. The same is true under the Iowa statute, and a promissory note so given is void even in the hands of an innocent holder for value: *Traders' Bank v. Alsop*, 64 Iowa, 97, 19 N. W. 863. See, also, *Conklin v. Robets*, 36 Conn. 461; *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916, 55 Pac. 306. In this state there is no statute declaring in express terms that all contracts in furtherance of gambling are void, as in the above states. But gaming itself is made unlawful by chapter 37 of the Penal Code (Rev. Codes 1899), which chapter, in its prohibitions, extends to the game at which the plaintiff herein lost the check in suit. It is entirely clear, and, indeed, it is not controverted, that the transaction in which the indorsement of the note by plaintiff to Maxwell was made was one prohibited by express law, and that the consideration for such indorsement was illegal. Of what legal effect, then, we may ask, was the indorsement? Did it have the effect of transferring the check to Maxwell as an innocent purchaser, and enable him to legally enforce payment from defendant, notwithstanding the unlawful means by which the possession and indorsement were obtained? Defendant's counsel contend that it did have such effect, and that, had the defendant refused to pay him, it could, under the law, have been compelled to do so, even though it had notice of the entire gambling transaction. This contention we cannot sustain. It is not, however, without specious reason and respectable authority to support it. The well-settled rule of law and equity is invoked by the defendant, "*In pari delicto potior est conditio possidentis*," under which neither party to an illegal contract may be aided by the courts, either to set it aside or enforce it; or, as was said in *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759: "Whenever the agreement is immoral, or against public policy, a court of justice leaves the parties as it finds them. If the agreement be executed, the court will not rescind it; if executory, the court will not aid in its execution." And in *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124: "It will not recognize a right of action founded on the illegal contract in favor of either party against the other." This court had occasion to apply the rule to a Sunday

transaction, which was alleged to have been illegal, in *Rosenbaum v. Hayes*, 10 N. Dak. 311, 86 N. W. 973, and we there held that, so far as the transaction was executed the law leaves the parties where their unlawful acts have placed them. In addition to the cases cited in the opinion in that case, see, also, *Kahn v. Walton*, 46 Ohio <sup>17</sup> St. 195, 20 N. E. 203; *Spring Co. v. Knowlton*, 103 U. S. 49; *St. Louis etc. R. R. Co. v. Terre Haute etc. R. R. Co.*, 145 U. S. 393, 12 Sup. Ct. Rep. 593; 15 Am. & Eng. Ency. of Law, 2d ed., 999. Under the same authorities, and for the same reasons, so far as it is executory, the contract is not enforceable: 2 *Pomeroy's Equity Jurisprudence*, sec. 939. It is contended that the indorsement and delivery of the check in this case was an executed transaction, and that, accordingly, under the foregoing rule, the plaintiff lost all of his rights in the check, and that Maxwell acquired the same. In support of this position counsel for appellant cite *Reed v. Bond*, 96 Mich. 134, 55 N. W. 619, and *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203. *Reed v. Bond*, 96 Mich. 134, 55 N. W. 619, is similar to the case at bar, and is squarely in point and upholds counsel's view. It rests, however, upon the declaration that the gaming contract was fully executed. The unsoundness of this contention lies in the assumption that the contract of indorsement was valid and complete. "An indorsement is a written contract, the terms of which, though usually omitted for the convenience of commerce, are certain, fixed, and definite, and not the less perfectly understood because not expressed in words." It, "like any other written promise or agreement, requires two things besides the mere writing to constitute a contract, viz., a delivery and a consideration," and "the delivery and consideration are always open to impeachment": 4 Am. & Eng. Ency. of Law, 2d ed., 485, 487, and cases cited; and the general rule that parol evidence is inadmissible to contradict, vary, or add to a written contract does not preclude the admissibility of such evidence to show the illegality of a contract. In such case the evidence is not admitted to vary or control the contract, but to show that in contemplation of law, in consequence of the proven illegality, no contract at all ever had any existence; that it was void ab initio. And it is further held that "when the defendant does not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiff or defendant, it becomes the duty of the court sui

sponte to refuse to entertain the action": 15 Am. & Eng. Ency. of Law, 1015, and notes; *Johnson v. Willard*, 83 Wis. 420, 53 N. W. 776. It is clearly the plain policy of the law not to extend aid to either party to an unlawful transaction, and to refuse to recognize rights or entertain actions which arise from acts which are under its condemnation.

Does the application of these principles to the facts of this case make Maxwell an indorsee in due course, and clothe him with all of the rights of a good faith purchaser for value? A negative answer to this question must be given. In the first place, the contract of indorsement was defective, and subject to impeachment, by reason of the admitted illegality of the consideration—this upon elementary principles of the law of contracts. The defective indorsement did not, in our opinion, constitute a contract to which the principle invoked could apply. It is clear that Maxwell could not successfully <sup>18</sup> maintain an action against the plaintiff upon the indorsement; and it would seem that the courts would not aid him to enforce payment from defendant for the sufficient reason that his right of action would arise out of the indorsement made in the unlawful gambling transaction. On the other hand, plaintiff is not seeking the aid of the court in this action to enforce a gambling contract, or of any right growing out of the indorsement, but is merely attempting to enforce the defendant's promise to him contained in the cashier's check, which is not tainted by any illegality whatever. His cause of action does not arise in the gambling transaction; whereas the defense of payment, which is relied upon to defeat a recovery by plaintiff, rests entirely upon an affirmance of the transfer of the check in the gambling transaction, for on no other ground could Maxwell, after notice, have the right to receive or enforce payment. As has been already stated, the courts will not recognize and enforce rights arising on illgotten title: *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71; *Miller v. Marekle*, 21 Ill. 152; *Riedle v. Mulhausen*, 20 Ill. App. 68; *Cochran v. Strong*, 44 Ga. 636; *Southern Express Co. v. Duffey*, 48 Ga. 358. On principle therefore, we have reached the conclusion that the title, rights, and possession of the check by Maxwell, under the facts as they appear, are directly analogous to those of the finder of a lost note which has been indorsed by the payee, or of such an instrument in the hands of one who has stolen it. *Prima facie*, every holder of a negotiable instrument is deemed a holder in due course, both under the law-

merchant and under the statute of this state. See section 59 of chapter 100 of the Civil Code (Rev. Codes 1899), which is the chapter governing negotiable instruments executed after July 1, 1899; 2 Randolph on Commercial Paper, sec. 730; *Million v. Ohnsorg*, 10 Mo. App. 432. And "the mere possession of a negotiable instrument which is payable to the order of the payee, and is indorsed by him in blank, or of a negotiable instrument payable to bearer, is in itself sufficient evidence of his right to present it, and to demand payment thereof. And payment to such person will be valid, unless he is known to the payor to have acquired possession wrongfully": 1 Daniel on Negotiable Instruments, sec. 573, and cases cited in notes. If any doubt could exist as to the correctness of our conclusion that Maxwell's title to the check was imperfect, and the contract of indorsement legally unenforceable either against the indorser or the payor, it is set at rest by section 55 of the act above referred to, which reads as follows: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear or unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The above statute was in force when the transaction in question took place, and is controlling. Under said section Maxwell's title was defective for two reasons: 1. He procured the signature <sup>19</sup> of plaintiff by unlawful means; and 2. He obtained the check for an illegal consideration. Further, the fact is established that he was not a holder in due course, and had not the rights of such a holder, for the reason that he did not take the instrument in good faith and for value, which is one of the requirements to render a holder a holder in due course under section 52 of the chapter above referred to.

The rule as to the payment and discharge of negotiable instruments is that payment of the bill or note must be made to the rightful holder or his authorized agent. "In general, a payment is valid as against other parties when made in good faith, and in ignorance of all facts which impair the holder's title. . . . If payment is made to one who holds under a blank indorsement, his possession will be presumptive evidence of his title and right to receive the money. Anyone in possession is entitled *prima facie* to receive payment of a note payable to bearer, or to 'A, or bearer.' If it is so payable,



even a payment made in good faith to a thief or finder who is in actual possession will be good. . . . But a payment made through negligence to one who is neither the rightful holder nor a bona fide purchaser before maturity, after notice of loss, will not be sufficient": 3 Randolph on Commercial Paper, sec. 1444, and cases cited. And the same author says in section 1467 that, "if the indorsement is for an illegal consideration, such as a gambling debt [and that is this case], payment made to the indorsee after notice of that fact will be of no avail as against the indorser": citing *Commercial Nat. Bank v. Spaid's*, 8 Ill. App. 493; *Wheeler v. Winn*, 38 Vt. 122. Under the above doctrine, which appeals to us as both just and sound, it is apparent that the defense of payment to Maxwell, the indorsee—which is the only defense in the case—turns entirely upon the question as to whether such payment was made in good faith, and without notice of the defect in Maxwell's title; for, as before stated, payment by the maker to a party who claims to be a bona fide holder is not sufficient to protect the maker against the claim of the real owner, when made after notice: *Bainbridge v. City of Louisville*, 83 Ky. 285, 4 Am. St. Rep. 153.

The remaining question relates to the sufficiency of the evidence as to defendant's notice. The jury found that the defendant had notice, and the trial court refused to grant a new trial upon the ground of the alleged insufficiency of the evidence to sustain such finding. Our inquiry is limited to ascertaining whether there is any legal evidence in the record fairly tending to sustain this finding. "Under an established rule of practice, this court will not ordinarily disturb a verdict upon a mere question of fact, where there is substantial evidence upon which the verdict may rest": *Heyrock v. McKenzie*, 8 N. Dak. 601, 80 N. W. 762; *Taylor v. Jones*, 3 N. Dak. 235, 55 N. W. 593; *Black v. Walker*, 7 N. Dak. 414, 75 N. W. 787; also, *Flath v. Casselman*, 10 N. Dak. 419, 87 N. W. 988. We find the evidence contained in the record sufficient to support the finding of the jury on this <sup>20</sup> point. It discloses that plaintiff went to defendant's place of business in the morning of the nineteenth—the next day after he had made the deposit—and before the bank opened for the day. Maxwell and Mr. Movius, the president of the bank, were then on the inside of the building. After entering, the plaintiff called Maxwell aside, and tried to induce him to return the check, or all or a part of the money, telling him that he had made him sign

the check, and had practically stolen it. Maxwell refused. The paying teller's window was opened just at that time, and Maxwell stepped up, and presented the check to Nellie Sanders, the paying teller, for payment. The plaintiff said to her: "Madam, I cancel that check. I don't want you to pay it." Plaintiff testifies: "When I demanded the cancellation of the check, she took the check, and asked if that was my name, and I said, 'Yes,' and she said . . . . I would have to go and see Mr. Movius. . . . I went and called him, and he came out, and she had paid the money to Maxwell, and he was going out the door. I asked him [Movious] why that money was paid, and he said, 'Because your name was on the back'; and I said, 'I shall have to try and get that money back.' 'Well,' he said, 'you go ahead, and find a way to get it back.'" Nellie Sanders, in narrating the circumstances under which the payment was made, says: "Mr. Maxwell came in a little before nine in the morning. The outside door was open. We had not yet opened the curtain. E. A. Movious, the president of the bank, came in, and told Miss Movious (the assistant cashier) that she had better open up; that it was not quite nine, but she had better open up, as he thought Ralph Maxwell wanted something. . . . . As soon as the curtain was up, Maxwell pushed the check through the cashier's window. It was already indorsed by himself and John Drinkall. . . . . I turned, and took up the signature book, to see that it was properly indorsed, and as I did so Maxwell said: 'It is all right. I have indorsed it. I am good for it.' Drinkall stood right by Maxwell, and said, before it was paid, 'I demand it canceled.' Maxwell replied, 'That is all right.' After seeing that the signature was correct, I proceeded to count out the money. While I was doing this, Drinkall several times said, 'I demand it canceled.' To each such statement Maxwell replied, 'That is all right' or some such answer. I supposed he was talking to Maxwell, and because he was under the influence of liquor I paid less attention to him. Maxwell said to him, 'You can go and see Emil' (meaning Movious). He was in the private office. He went in there, and when he returned I had paid the check to Maxwell." E. A. Movious testifies in part: "After the bank had opened, Drinkall and Maxwell were standing together in the office. I don't know what they were talking about. As soon as Drinkall came in, he said to me, 'I want that canceled'; and I said 'What do you want canceled?' and he said, 'I want that check

or money.' . . . I stepped out to him, and Maxwell was standing in front <sup>21</sup> of the bank window, and had the money counted. . . . I said, 'Is that your signature on the back?' and he said 'Yes.' 'Well,' I said, 'I don't know how I can help you. It is paid'; and I passed it back." There is other testimony in the record going more into the details of payment, but that above quoted is sufficient for the purpose of this decision. We have reached the conclusion that the facts as detailed were sufficient to warrant the jury in finding that defendant had notice of the defect in Maxwell's title, and to make its act in paying the check to him an act of bad faith. Section 5118 of the Revised Codes provides that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." The plaintiff had deposited this money only the day before. Movius admits that he knew Maxwell conducted a gambling establishment. It appears that he ordered the bank opened before the regular time to accommodate Maxwell, and, further, that the check was paid to Maxwell in open defiance of the plaintiff's personal and repeated protests against its payment to him. These facts and circumstances might well be held by the jury to be sufficient to put a prudent man upon inquiry as to how Maxwell had obtained the check, and that an inquiry made with reasonable diligence would have disclosed the entire transaction is entirely apparent. A simple inquiry by the bank's officers for his reasons for demanding that Maxwell should not be paid would have made known the specific defect in the latter's title.

But we are also of opinion that the evidence is sufficient to sustain a finding by the jury that defendant had not only constructive notice, but actual notice, that plaintiff, and not Maxwell, was the owner of the note, and entitled to payment. It is true the language he used, "I cancel that check; I don't want you to pay it," would be more appropriate to a countermand by the maker of a check, in which case the language would be strictly within the legal right of the party countermanding payment. But in considering the question of notice we are not controlled by the technical language used. The question here is whether Drinkall brought home to the bank knowledge of Maxwell's defective title before it parted with its money. We are constrained to hold the evidence sufficient for that purpose. The language of his demand, when taken

in connection with the other circumstances, would fairly mean that plaintiff claimed that he, and not Maxwell, was the owner of the check. Prima facie, Maxwell was entitled to receive payment; but when his title was challenged by the plaintiff, as it was, the defendant paid it at the peril of having to pay the rightful owner.

Finding no error in the record, the judgment is affirmed. All concur.

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*A Negotiable Instrument Founded upon an Illegal* or gambling consideration is considered, by some authorities, as void even in the hands of a bona fide holder: *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916, 55 Pac. 306; *Irwin v. Marquette*, 26 Ind. App. 383, 84 Am. St. Rep. 297, 59 N. E. 38; *Snoddy v. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127. Other authorities, while regarding invalid as between the original parties, consider it enforceable in favor of a bona fide holder: *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687; *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 50 Am. St. Rep. 860, 22 S. E. 487. See, in this connection, *Pritchett v. Ahrens*, 26 Ind. App. 56, 84 Am. St. Rep. 274, 59 N. E. 42; *Stanford v. Howard*, 103 Tenn. 24, 76 Am. St. Rep. 635, 52 S. W. 140. An indorsement arising out of a gambling transaction has been held void, and the indorsee without title to the paper: *Chapin v. Dake*, 57 Ill. 295, 11 Am. Rep. 15. But see *Albertson v. Laughlin*, 173 Pa. St. 525, 51 Am. St. Rep. 777, 34 Atl. 216.

*Bona Fide Ownership of Negotiable Instruments* is discussed in the monographic notes to *Bedell v. Herring*, 11 Am. St. Rep. 309-326; *Sims v. Lyles*, 26 Am. Dec. 156-158. It is presumed that a person in possession of a negotiable instrument is a holder for value: *Manhattan Sav. Inst. v. New York Nat. Ex. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079.

*A Check is Revocable* before presentation for payment: *Note to Hawes v. Blackwell*, 22 Am. St. Rep. 876. But the drawer cannot stop payment after it has passed into the hands of a bona fide holder: *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270, 49 N. E. 420.

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## GAGNIER v. CITY OF FARGO.

[11 N. Dak. 73, 88 N. W. 1030.]

**MUNICIPAL CORPORATIONS—Use of Sidewalks by Bicycles.**—City councils are empowered to regulate the conditions under which city sidewalks may be used by bicycles or to prohibit the use of the sidewalks by them entirely. (p. 708.)

**MUNICIPAL CORPORATIONS—Use of Sidewalks by Bicycles—Duty of City.**—A city fulfills its duty toward persons using the sidewalks therein for bicycle riding, when it keeps such sidewalks in a reasonably safe condition for travel thereon by pedestrians. (p. 710.)

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**MUNICIPAL CORPORATIONS—Use of Streets by Bicycles—Duty of City.**—One injured while rightfully riding a bicycle on the sidewalk of a city street cannot recover against the city, if such sidewalk was in a reasonably safe condition for pedestrians, though it was not in a reasonably safe condition for bicycle riding. (p. 711.)

C. F. Miller, for the appellant.

Pierce & Von Neida, for the respondent.

**74** MORGAN, J. On October 18, 1899, the plaintiff was riding on his bicycle on the sidewalks of the defendant city, and was thrown therefrom and injured. He brings this action to recover damages for such injury. The complaint alleges that the city “negligently suffered and permitted the sidewalk on which the injury occurred to be and remain unsafe, unsuitable and insufficient for the public use and travel thereon,” and that such sidewalk was “rendered unsafe, unsuitable, and insufficient . . . by reason of the fact that many bricks had been removed therefrom, leaving a large, deep, and dangerous hole therein, . . . and also by reason of the fact that other bricks in said sidewalk, around the borders of said hole therein, were then and there loose, and not properly bedded upon the surface of the ground, so that pressure upon them would overturn them.” The complaint further states, in substance, that while riding on such sidewalk on his bicycle on said day, and while in the exercise of due care, and without fault of his own, plaintiff was thrown from such bicycle by reason of such defective and unsafe conditions of such sidewalk, and injured. After a trial a verdict was rendered in his favor for the sum of three hundred dollars. The defendant duly moved for a new trial upon a statement of the case duly settled, and such motion was denied. The city appeals from the order denying the motion for a new trial.

The assignments of error relate to alleged errors in giving instructions to the jury, errors of law in admitting testimony, the refusal to direct a verdict for the defendant, and the insufficiency of the evidence to justify or sustain the verdict. A consideration of **75** two of the assignments will suffice to decide the case as presented on the appeal. These two assignments pertain to the question whether the city is liable, in any event, for damages growing out of injuries caused while riding a bicycle on the sidewalks of the city, and whether the instructions to the jury, duly excepted to, correctly laid down the law as to the

liability of the city for injuries to persons caused by defective sidewalks while such persons are riding thereon on bicycles.

The city of Fargo was incorporated as a city under the general law for the incorporation of cities. Under such general law the city council is vested with power to lay out streets, and to regulate the use of the same. Like power is vested in the council "to regulate the use of sidewalks": Rev. Codes, sec. 2148. Under such general law the city council of Fargo enacted the following ordinances:

"Sec. 5. No person shall place, push, draw or back any wagon, cart or other vehicle on any sidewalk, or use, drive or ride any horse or other animal, wagon, sleigh or other vehicle thereon, unless it be in crossing the same to go into a yard or lot where no other suitable crossing or means of access is provided."

#### "Bicycle Ordinance.

"1. Bicycles on Sidewalks of What Streets.—No person shall ride any bicycle or tandem on the sidewalk of that part of any street or avenue upon which the railway of such street or avenue is paved or on the west side of Eighth street South between Front street and Eighth avenue South or on Roberts street between Northern Pacific avenue and Second avenue South.

"2. Shall have Alarm—How Given—Speed.—No person shall ride any bicycle or tandem on any street or avenue at any time without carrying an alarm bell or whistle, which shall be rung or sounded at least seventy-five feet before meeting or passing a person on a similar vehicle or on foot upon any sidewalk . . . and the speed of all bicycles or tandems shall be reduced to not more than five miles per hour while meeting or passing any person on any sidewalk."

In our opinion, section 5, given above, was not enacted with a view to prohibit the riding of bicycles on the sidewalks of the city of Fargo. The use of the word "vehicles" in the ordinance, it is claimed, gives it a sufficiently broad meaning to include bicycles. That the bicycle is now classed as a vehicle is true. Had the ordinance forbidden the use of all vehicles on the sidewalks, it would, without question, be a prohibition of the use of the bicycle on the sidewalks. But if that ordinance prohibits the use of bicycles on the sidewalks, it must be by virtue of the fact that the word "vehicle" includes in its meaning a bicycle. The word "vehicle" is here used in connection with the words "wagon," "cart," and "sleigh," and was intended to

include, and should be construed as limited to, other vehicles of a like character with those mentioned. This construction seems the more <sup>76</sup> reasonable in view of the provisions of the bicycle ordinance quoted above. If section 5 was intended to include within its provisions bicycles, then the passage of the ordinance prohibiting the use of bicycles on certain streets was unnecessary and accomplished nothing, and was an enactment, the subject of which was already covered by ordinances already in force, or enacted at the same time. Construing the three ordinances together, effect can be given to all of them only by construing the first as not intended to include bicycles within its prohibition.

Coming now to a consideration of the bicycle ordinance, it is clear that section 1 is an express prohibition against riding the bicycle on the streets and avenues therein described. The injury of which the plaintiff complains occurred on Sixth avenue North between the points of intersection with Second and Third streets North. Sixth avenue North is not paved, and is not included within the district on which the riding of bicycles is prohibited under section 1. This brings us to the consideration of the provisions of the ordinance, in section 2 thereof, defining the conditions under which it shall be unlawful to ride bicycles on streets or avenues not included within the district in which the use of bicycles is absolutely prohibited. Under the language of such section, it cannot be said that the use of bicycles is absolutely prohibited or authorized. In effect, and by necessary implication, the language permits their use there if the conditions named are complied with. To ride a bicycle on the avenue where the accident occurred was not unlawful in itself, nor prohibited by an ordinance. The plaintiff was rightfully riding his bicycle there under a conditional authority given by the city and therefore with its assent. The matter of authority or prohibiting the using of the sidewalks by persons riding bicycles is within the powers delegated to city councils. Such councils may license the use of the sidewalks by such persons, or may entirely prohibit their use to persons riding bicycles. Although the sidewalks are primarily constructed and to be used by pedestrians, and the bicycle is a vehicle, that under some circumstances more properly belongs to the highway or street, still the council is empowered to regulate the conditions under which the sidewalks may be used by bicyclers, or to prohibit the use of the sidewalks by them entirely. This power is left to the discretion of city councils, as they can easily

determine when the use of the sidewalks by persons riding bicycles is or may be dangerous, and when not dangerous, and necessary for the convenience, business, or pleasure of the traveling public. The following cases will be found instructive upon the question of the powers of city councils to regulate the use of streets and sidewalks for bicycles: *Lechner v. Village of Newark*, 19 Misc. Rep. 452, 44 N. Y. Supp. 556; *Jones v. City of Williamsburg*, 97 Va. 722, 34 S. E. 883; *Swift v. City of Topeka*, 43 Kan. 671, 23 Pac. 1075; *Lee v. City of Port Huron*, 128 Mich. 533, 87 N. W. 637; *Holland v. Bartch*, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83.

77 The city having by these ordinances permitted persons to ride on the sidewalks under certain conditions and regulations, it follows that the plaintiff was not unlawfully riding his bicycle on the walk in question when the injury occurred. The city having thus permitted this sidewalk to be used by bicycle riders, what, if any, duty did it owe to such persons, so far as maintaining such walk in such condition that such use of it would not be attended with danger? In this state it has been held that cities owe it as a duty to pedestrians to keep the sidewalks in condition for safe travel, and that such cities are liable for damages occurring by reason of the negligence of the city in not keeping such walks in proper repair for safe travel thereon, and are so held liable although not made so by express statute: *Ludlow v. City of Fargo*, 3 N. Dak. 485, 57 N. W. 506. That sidewalks are not intended for use by vehicles in general cannot be disputed. That such walks are built to be used by pedestrians may be taken as true, also. That the bicycle is classed as a vehicle is also true. The authorities so hold, we believe, without exception: 4 Am. & Eng. Ency. of Law, 20, and cases cited; also cases hereinbefore cited; *Meyers v. Hinds*, 110 Mich. 300, 64 Am. St. Rep. 345, 68 N. W. 156; *Thompson v. Dodge*, 58 Minn. 555, 49 Am. St. Rep. 533, 60 N. W. 545, 608. The city, by its enactments, made it rightful for the plaintiff to ride on the walk in question upon his bicycle. It did not thereby, nor is there any general law to that effect, assume any new obligation or duty to him while riding the bicycle on such walk. Its duty is to maintain the walk in suitable condition for pedestrians, and its duty to bicycle riders, to any greater degree than to pedestrians, cannot be predicated upon the mere fact of having granted permission to use the walks with bicycles. It is a matter of common knowledge and observation that a sidewalk in suitable condition for



safe travel by pedestrians would not be safe for bicycle riders traveling thereon. A very slight defect in the walk or road often causes an accident to the bicycle rider, which could under no circumstances interfere with travel by pedestrians. The test whether the sidewalk is in safe condition for travel is that it must be safe for pedestrians, and not for those using bicycles. The trial court instructed the jury as follows: "Under the law, it is the duty of the defendant city to keep its sidewalks in reasonable good order and condition for the safe use and convenience of the traveling public. The defendant's duty to keep its sidewalks in a reasonably safe condition for travel applies to a defect in the construction, as well as the neglect to repair any injuries found therein. If you find from the evidence that the sidewalk in question was in an unsafe condition, and that the plaintiff was injured thereby without any contributory negligence upon his part, . . . then your verdict will be for the plaintiff." The defendant duly excepted to the giving of each of these instructions. The objection urged against them is that the city is to be held liable, under the rules therein laid down, if the sidewalks are not safe for travel by bicycle riders. The evidence in the case shows <sup>78</sup> that this walk was used by persons while riding on bicycles, and the jury must have understood from such instructions that these walks must be kept in condition for safe travel by the traveling public, including those persons riding bicycles. Such is not the law, and a different rule has been upheld even in cases where permission was granted to persons to ride their bicycles upon sidewalks upon payment of a sum of money as a license. The court, in *Sutphen v. Town of North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128, said: "It is apparent that a bicycle rider upon an ordinary country road is exposed to greater dangers than a person riding in a wagon, . . . but under the present highway laws a road in a condition which is reasonably safe for general and ordinary travel is all that the commissioners of highways are bound to maintain." In *Leslie v. City of Grand Rapids*, 120 Mich. 28, 78 N. W. 885, the supreme court of Michigan has said: "Where a street is kept in a reasonably safe and fit condition for ordinary vehicles, such as wagons and carriages, a town is not liable for injuries received by one thrown from her bicycle by reason of its defective condition." The same court reaffirmed the doctrine of the last case in *Lee v. City of Port Huron*, 128 Mich. 533, 87 N. W. 637, and used this language: "Compiled Laws, section 3441, requiring side-

walks to be kept in reasonable repair, and in a condition reasonably safe for travel, only requires that a sidewalk shall be kept in such repair as to render it safe for ordinary uses, and does not mean that it shall be kept in a safe condition for bicycle riding, though a lawful city ordinance authorizes such use." In *Morrison v. City of Syracuse*, 45 App. Div. 421, 61 N. Y. Supp. 313, the court said: "One injured while rightfully riding a bicycle on the sidewalk cannot recover, if the sidewalk was in a reasonably safe condition for pedestrians, though it was not in a reasonably safe condition for bicycle riding." In *Wheeler v. City of Boone*, 108 Iowa, 235, 78 N. W. 909, the court says: "One injured while riding a tricycle on a sidewalk can recover only if the city was negligent in failing to keep the walk in suitable condition for people to walk over," etc. The instructions given by the trial court to the jury failed to inform the jury, directly or indirectly, that if the sidewalk in question was in a reasonably safe condition for travel by persons walking thereon, then the city would not be liable for plaintiff's injuries, caused while attempting to travel over the walk on his bicycle. Because the city has permitted the use of this street by persons riding a bicycle cannot be a ground for holding that such permission imposed upon the city additional responsibility to keep the walks in that extra good condition of repair required for safe travel by bicycle riders. It is well known that a higher degree of perfection in building and keeping sidewalks in repair would be required than at present if the city were compelled to keep the walks in condition for riding upon bicycles. A person riding a bicycle has a right to assume that the walk is in safe condition for pedestrians <sup>79</sup> to use, and, if he is injured when the walks are in such condition, he cannot complain, and he must bear the loss, as he assumed the risk. If not in such condition, he can recover for injuries, if he acted without contributory negligence.

For these reasons the order is reversed a new trial granted, and the cause remanded for further proceedings according to law.

All concur.

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*The Use of Bicycles* on the public streets is subject to just and reasonable regulations: *Des Moines v. Keller*, 116 Iowa, 648, 93 Am. St. Rep. 268, 88 N. W. 827. Riding them on the sidewalk by persons over twelve years of age may be prohibited by statute: *State v. Aldrich*, 70 N. H. 391, 85 Am. St. Rep. 631, 47 Atl. 602. As to the rights of bicycle riders in streets and highways, see the monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 377, 378; *Thomp-*

son v. Dodge, 58 Minn. 555, 48 Am. St. Rep. 533, 60 N. W. 545; Peote v. American Product Co., 195 Pa. St. 190, 78 Am. St. Rep. 806, 45 Atl. 934. As to the liability of a city for defects in a bicycle path when other parts of the street are safe, see Prather v. Spokane, 29 Wash. 549, 92 Am. St. Rep. 923, 70 Pac. 55. A bicycle is a vehicle, and has no lawful right to the use of a sidewalk: Knouff v. Logansport, 26 Ind. App. 202, 84 Am. St. Rep. 292, 59 N. E. 347. But a bicycle is not a carriage within the meaning of a statute requiring towns and cities to keep highways in repair so as to be reasonably safe for travelers with their horses, teams and carriages: Richardson v. Danvers, 176 Mass. 413, 79 Am. St. Rep. 320, 57 N. E. 688.

*A City Must Keep Its Streets in a reasonably safe condition:* Magaha v. Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317, and cases cited in the cross-reference note thereto; but it is only required to keep the respective portions thereof, divided into sidewalks and roadways, in a reasonably safe condition for the purposes for which they are respectively devoted: Kohlhof v. Chicago, 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446.

## WOODHULL v. FARMERS' TRUST COMPANY.

[11 N. Dak. 157, 90 N. W. 795.]

**FOREIGN RECEIVERS—Attachment of Property in Hands of.**—If a receiver has obtained rightful possession of personal property within the jurisdiction of his appointment, he cannot be deprived of its possession by attachment when he takes it in the performance of his duty into a foreign jurisdiction. While in such foreign jurisdiction it cannot be taken from his possession by resident or nonresident creditors of the insolvent debtor. (p. 719.)

**FOREIGN RECEIVERS—Attachment.**—The property of a nonresident defendant cannot, while in the hands of a receiver appointed in another state, be seized under attachment, when brought within the state for a lawful purpose. (p. 719.)

**FOREIGN RECEIVERS—Attachment.**—Property of a nonresident defendant is liable to seizure under attachment within the state prior to the appointment of a receiver therefor in another state or before such receiver takes actual possession of the property within his own state. (p. 719.)

J. E. Greene, for the appellant.

Ball, Watson & Maclay, for the respondent.

**158 WALLIN, C. J.** This action was brought to recover damages for an alleged breach of contract, and the summons was served by publication. It is conceded that both of the defendants in the action are nonresidents, and that they reside in the state of Iowa. An affidavit for attachment, stating that the defendants are nonresidents of this state, and that "the defendants have property within this state subject to attachment," was filed with the clerk of the district court, together

with the complaint in the action. Upon the filing of the same, a warrant of attachment issued, and was delivered to the sheriff for service. On the day it was issued, February 8, 1899, the sheriff, under said warrant, attached and took into his possession a certain mortgage upon real estate situated in Cass <sup>159</sup> county, North Dakota, and certain notes secured by said mortgage, consisting of a principal note, together with nine interest coupon notes. The mortgage so attached was made by George Foley and wife, as mortgagors, to one of the defendants in this action, viz., the Farmers' Trust Company of Sioux City, Iowa, and the notes were made payable to said mortgagee. The attachment of said property was made under the conditions hereafter stated. Prior to the seizure under the attachment an action had been instituted in the district court for Cass county to foreclose said mortgage. In said foreclosure action, George Foley and his wife were defendants, the Sioux City Safe Deposit and Trust Company was plaintiff, and the Farmers' Trust Company, one of the defendants herein, was intervener. It appears that, while the testimony in the foreclosure action was being taken by a referee appointed in that action, the mortgage and all notes in question were offered in evidence, and were received and marked as exhibits by the referee, and that subsequently the referee allowed the attorney for the defendants in that action to remove the mortgage and notes to his office, temporarily, for examination, and that while the same were in the hands of such attorney they were attached, as above stated, and taken into the sheriff's possession. It appears that the mortgage and principal note, with two coupon notes, were delivered to the defendant herein, George H. Hollister, by one W. P. Manly, who was then president of the plaintiff in the foreclosure action, the Sioux City Safe Deposit and Trust Company, to be brought into this state for the purpose of being introduced in evidence in the course of the examination of said Hollister as a witness in the foreclosure action; and the further fact appears that the remaining coupon notes, seven in number, were at the same time put in evidence by the intervener in that action, the Farmers' Trust Company, in support of its complaint in intervention; and it also appears that said coupon notes were, when introduced in evidence, the property of the defendant herein, the Farmers' Trust Company. The undisputed evidence shows that said mortgage and notes were, soon after their execution and delivery, sold, assigned, and transferred by the said mort-



gagee, and that by certain mesne assignments and transfers the said mortgage and principal note for two thousand dollars, together with two coupon notes attached thereto, were acquired by, and became the property of, the plaintiff in said foreclosure action. The foreclosure action was commenced on or about the twenty-fifth day of April, 1898, and subsequently, and before said mortgage and notes were seized and attached herein, the defendant the Farmers' Trust Company, intervened in the foreclosure action, and filed its complaint in intervention in said action, and did so for the purpose of protecting its interests as owner of the said seven coupon notes. The further fact appears that long prior to the commencement of said foreclosure action, and on the twenty-eighth day of December, 1896, in an action then pending in the district court for Woodbury county, in the state of Iowa, in which one C. C. Abbott was plaintiff, and said defendant herein, the Farmers' 169 Trust Company of Sioux City, Iowa, was defendant, such proceedings were had that the defendant herein, George H. Hollister, was duly appointed as receiver of said Farmers' Trust Company, and after such appointment he qualified and entered upon his duties, and that he was such receiver when this action was commenced, and has ever since been such receiver; that pursuant to such appointment the Farmers' Trust Company transferred to the receiver said seven coupon notes, with other property, and said notes were in the hands of the receiver when he brought the same into this state to be used by the intervener as evidence in said foreclosure action. And the further fact appears that said George H. Hollister, as a witness for the plaintiff in the foreclosure action, brought into this state the mortgage and the principal note and said two coupon notes, and the same were put in evidence, together with the coupon notes, as above stated. The facts as above narrated were duly brought to the attention of the district court upon the hearing of a series of motions made in this action in said court, and to the consideration of which motions we will now give attention.

The defendants in this action, by their attorneys, appearing specially for the purposes of the motion only, upon due notice, moved in the district court "for an order vacating and setting aside the writ of attachment herein issued and levied upon the eighth day of February, 1899, and vacating and setting aside the service of the summons and complaint in said action based upon said levy and said writ of attachment." This motion,

which was contested, was heard and decided on August 30, 1899; and on said date an order was made granting the motion, in which the following language was used: "The court states, in granting this motion, that it had not in any way passed upon the contention between the defendants and the Sioux City Safe Deposit and Trust Company with reference to the ownership of the property in question." On the same day and upon the same state of facts, another motion was heard and decided in the district court, in which motion the plaintiff, the intervener, and the referee in the foreclosure action were the moving parties; and they applied to the district court for "an order directing the sheriff of said county of Cass to turn over to said Charles F. McNamara, as referee, the mortgage and notes referred to." This motion was also granted on August 30, 1899, and the order embraced a statement similar to that above given, to the effect that the question of the ownership of the property attached herein was not decided in passing upon the application to return the attached property to the referee. The further proceedings in this action are recited in the abstract filed in this court, from which we quote as follows: "And thereafter, it appearing to the court and to the parties to this action that the question of the title to the notes and mortgage referred to in the motion papers and affidavits was involved in the said action of the Sioux City Safe Deposit and Trust Co. v. Foley et al., and would necessarily be determined therein: Therefore, on August 31, 1899, on plaintiff's request, the plaintiff and defendants <sup>161</sup> herein (said defendants appearing specially) agreed in open court that said orders hereinbefore recited should be held in statu quo until the decision of this court in the said case of Sioux City Safe Deposit and Trust Co. v. Foley et al. was announced; that is to say, that the rights of neither of the said parties should be in any way affected thereby until the rendering of such decision, and that upon such decision in said action such order should be made by the court as might seem proper. And thereafter, and on or about the fifteenth day of April, 1900, the court having announced its decision in said last-mentioned case, finding and deciding therein and thereby that said Sioux City Safe Deposit and Trust Company was and is the owner of said notes and mortgages, with the exception of seven coupon notes, which last-mentioned notes were decided to be the property of said Farmers' Trust Company; said seven coupon notes being the same notes particularly mentioned in the affidavit of George H.

Hollister, and said motions being consolidated by consent of all parties: Now, therefore, upon motion of Messrs. Ball, Watson & Maclay, attorneys for the defendants herein, appearing specially for the purpose of this application only, it is ordered that the writ of attachment heretofore issued and levied herein upon the eighth day of February, 1899, be, and the same is hereby, vacated and set aside, and that the service of the summons and complaint in this action, based upon said levy and said writ of attachment be, and the same is hereby, vacated and set aside, and that said defendants have their motion costs herein, taxed at the sum of twenty dollars." From the order last above described, vacating the attachment and setting aside the service of the summons and complaint, plaintiff has appealed to this court, and the making of said order is assigned in this court as error.

The controlling facts may be summarized as follows: 1. That the defendants in this action were at all times in question non-residents, and that fact was stated in the affidavit for attachment; and it was further alleged in said affidavit that, when the affidavit was made, the defendants had property within this state subject to seizure by attachment. 2. That, as a matter of fact, the defendants, when the affidavit was made and the attachment was levied, had certain personal property in this state, to wit, seven coupon notes, of seventy dollars, each, and that such property was brought within the state by the defendant Hollister, as receiver, and that the ownership of said coupon notes was vested in Hollister in trust, as receiver, and was held in trust for the use and benefit of his codefendant, the Farmers' Trust Company. 3. That the residue of the property seized and attached herein was, when seized, the property of a stranger in this action, viz., the plaintiff in the foreclosure action. 4. That the property, when taken had been put in evidence, and was in the possession of the referee, but was <sup>162</sup> when seized temporarily in the custody of the attorney of the defendants in the foreclosure action.

In this court the question of law presented is whether the order appealed from is erroneous. The recitals in the abstract, as above quoted, strongly indicate that the trial court, as well as counsel on both sides, attached great importance to the disputed question of the ownership of the property seized under the attachment. This view of court and counsel is clearly manifested in the stipulation made in open court on August 31, 1899, which, in effect, was an agreement that the previous

orders of the court (those made on August 30th) should be held in abeyance and not be acted upon until the court had reached a final decision in the foreclosure action, in which action the ownership of all the property was directly in issue. Besides, the express terms of the final order are ample to indicate that the trial court bases such order upon its conclusions in the foreclosure action touching the title of said property. The order declares, "And therefore, and on or about the fifteenth day of April, 1900, the court having announced its decision in said last-mentioned case, finding and deciding therein and thereby that said Sioux City Safe Deposit and Trust Company was and is the owner of said notes and mortgages, with the exception of seven coupon notes, which last-mentioned notes were decided to be the property of said Farmers' Trust Company," etc. Upon this recital of grounds the court below proceeded to enter its order vacating the writ of attachment, and setting aside the service of the summons and complaint. It is our opinion that the order cannot be sustained upon any such foundation. The court found and decided in the foreclosure action that at the time the affidavit for attachment was filed, and when the levy was made, the defendant in this action, Farmers' Trust Company, who is conceded to be a nonresident, owned and had in Cass county, in this state, certain personal property, viz., seven coupon notes, of the face value of seventy dollars each. Certainly such finding directly corroborates the decisive fact embodied in the affidavit upon which the warrant issued. Nor does the fact that the officer, in seizing the defendants' property under the warrant, also seized and took into his possession certain other property not owned by the defendants, operate to defeat the attachment of defendants' property, or to disprove any fact upon which the warrant issued. It follows, therefore, in our opinion, that, if the order appealed from is to be sustained by this court, other grounds must be found upon which to rest such conclusion.

But we find no difficulty in affirming the order appealed from upon another ground. The complaint herein alleges "that on or about the twenty-eighth day of December, A. D. 1896, in proceedings duly instituted in a court of competent jurisdiction within said state of Iowa for the purpose of having appointed a receiver of all the property and assets of said corporation, the said defendant the Farmers' Trust Company was duly adjudged insolvent, and on or about the last-mentioned date the



defendant George H. Hollister <sup>163</sup> was by such court duly appointed as such receiver; that ever since such appointment the said defendant Hollister has been, and now is, the duly qualified and acting receiver of all the property and assets of said defendant corporation." These averments of fact in the complaint are conceded to be true by the defendants, and the undisputed evidence submitted on the hearing of the motions in the court below shows that, after qualifying as receiver, the defendant Hollister brought all the property levied upon into this state, including the seven coupon notes, which coupon notes he had received in trust from the estate of his codefendant, and which were, when brought into this state, in his personal possession as receiver; nor did the receiver place said trust property in the hands of the referee for any purpose, except to be used by the court as evidence in support of an action in which his cestui que trust was a party, and in which said coupon notes were necessarily offered in evidence. Upon this state of facts, counsel for the respondents contend that the order dissolving the attachment and setting aside the service of the summons should be affirmed. In our opinion, this contention is sound, and must be sustained. It is entirely elementary that the possession of property by a receiver is, in the eye of the law, regarded as the possession of the court which appointed the receiver, and hence such property, being in custodia legis, cannot be seized by attachment or execution when in the hands of a receiver: See Beach on Receivers, 2d ed., sec. 718; Adams v. Haskell, 6 Cal. 114, 65 Am. Dec. 491; High on Receivers, sec. 151. But it is also a familiar rule of law that powers which are exercised or conferred by courts are limited, and such powers cannot ordinarily be exercised beyond the boundary of the territory over which the court has jurisdiction. In view of this restriction upon judicial authority, the question has been much mooted, where a receiver, after taking possession of property belonging to the insolvent estate, removes the same personally or by his agents to another state, whether such property can be subjected to seizure by attachment or execution in actions brought in such state against the beneficiary of the trust estate. But the decided weight and trend of the adjudications are to the effect that under such conditions the property so brought within a state cannot be seized by creditors. This rule rests upon the doctrine of comity, and also, it seems, upon article 4, section 1, of the constitution of the United States, which reads: "Full faith and credit shall be given in

each state to the public acts, records and judicial proceedings of every other state; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." Under this provision and the acts of Congress it has been held "that the same effect is to be given to the record in the courts of the state where produced as in the courts of the state from which it is taken": See *Crapo v. Kelly*, 16 Wall. 610. The case cited arose under the insolvency laws of the state of Massachusetts, but the same rules applicable in such cases apply in receiverships. As supporting the better doctrine, see <sup>164</sup> *Beach on Receivers*, sec. 247; *Chicago etc. Ry. Co. v. Keokuk etc. Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557; *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *Cagill v. Wooldridge*, 8 Baxt. 581, 35 Am. Rep. 716; *Bagby v. Atlantic etc. Ry. Co.*, 86 Pa. St. 291; *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892 (dissenting opinion), cited, with note, in 15 Am. St. Rep. 76. See, also, *Reno on Nonresidents*, sec. 153, p. 186. In the case from Illinois (*Chicago etc. Ry. Co. v. Keokuk etc. Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557), a receiver appointed in the state of Missouri took into his possession, as receiver, a certain barge, and thereafter chartered the same to a steamboat company. The steamboat company took the barge to Quincy, Illinois, and there it was attached by the plaintiff in a suit against the insolvent. In that case the superior rights of the receiver were fully recognized, and the court said in the syllabus of the case, after stating the general rule as to the territorial limits of jurisdiction: "But where a receiver has once obtained rightful possession of personal property situate within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession, though he takes it, in the performance of his duty, into a foreign jurisdiction. While there it cannot be taken from his possession by creditors of the insolvent debtor who reside within such jurisdiction": Citing *Killmer v. Hobart*, 58 How. Pr. 452. Under these authorities, the rule is established that the property of a non-resident defendant cannot, while the same is in the hands of a receiver, if brought within this state for a lawful purpose, be seized under attachment proceedings in an action brought against such nonresident in this state. The same cases announce the opposite rule where the property of a nonresident is seized within the state prior to the date of the appointment of

a receiver in another state, or is seized before the receiver takes actual possession of the property within his own state.

Our conclusion is that the order dissolving the attachment was properly made, and the same will therefore be affirmed.

All the judges concurring.

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*Property in the Hands of a Receiver* is in custodia legis: *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855. An attachment of it is a contempt of court: *Farmers' Loan etc. Co. v. Bankers' etc. Tel. Co.*, 148 N. Y. 315, 51 Am. St. Rep. 690, 42 N. E. 707. See, too, *Riesner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep. 84, 36 S. W. 53.

*A Receiver Appointed for a Foreign Corporation* in one state does not acquire such title to the property of the corporation situated in another as to defeat an attachment subsequently issued at the instance of a creditor by a court of the latter state: *Gray v. Covert*, 25 Ind. App. 561, 81 Am. St. Rep. 117, 58 N. E. 731. See, in this connection, *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892, 15 Am. St. Rep. 76, and note.

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## DONOVAN v. ALLERT.

[11 N. Dak. 289, 91 N. W. 441.]

**MUNICIPAL CORPORATIONS—Use of Streets—Telephone Poles—New Servitude—Compensation.**—If the adjoining lot owner is the owner of the fee in the street to the center thereof, except as conveyed to the public for street purposes, the use of the street for telephone poles, even when authorized by the city authorities, is not a street use proper, but imposes a new burden or servitude thereon for which such lot owner is entitled to compensation. (p. 729.)

**MUNICIPAL CORPORATIONS—Use of Streets—New Servitude—Compensation—Injunction.**—If the abutting lot owner is entitled to compensation for the use of the street for telephone poles, he is entitled to an injunction to restrain the erection of such poles therein until compensation is made to him. (p. 730.)

Gordon & Lamb, for the appellant.

Cleary & McLean, for the respondents.

**290 MORGAN, J.** The plaintiff brings this action, and seeks to permanently enjoin the defendants from erecting telephone poles on the streets in front of his lots, situated in various blocks in the city of Langdon, North Dakota, and particularly described in the complaint, which is, in substance, as follows: That among other lots so described as being affected by the erection of such telephone poles, guy poles, cross-bar and

wires is the lot on which is erected the dwelling-house in which plaintiff resides; that two poles have been erected in the street in front of said lot, and that the erection of said poles at said places interferes with the ingress and egress to his said dwelling-house, and interferes with his property rights in said street, and deprives him of light and air to which he is entitled, and that such poles and fixtures render the appearance of said house unsightly, and tend to lessen its financial value and render it unsalable, and that such poles and fixtures will interfere with the growth of shade trees planted by him in close proximity to said poles; that said poles are thirty feet in height, and are placed in the ground at a distance of two feet from the sidewalk, and immediately in line of and in front of the walk leading from the sidewalk to his said dwelling-house; that said poles and wires interfere or will interfere with his legal rights in several other lots owned by him in said city; that the defendants were granted a franchise by said city to construct and operate a telephone system in said city by an ordinance duly enacted by the city council thereof, and that said ordinance does not provide for any compensation to be given to owners of property abutting on the streets of said city, nor does it provide that condemnation proceedings shall be instituted and completed before such system is constructed, or at any other time; that the said poles were erected without his consent and without compensation to him, and therefore in violation of section 14 of the constitution of North Dakota, and of section 5933 of the statutes of said state. The demand for relief is that the defendants be temporarily and permanently enjoined from putting up any more poles on the streets on which plaintiff's lots abut, and from operating such telephone exchange, until defendants have made just compensation to plaintiff as required by the laws and the constitution of the state. The defendants answer by denying any damage to plaintiff's property, and further allege that they have undertaken the construction of a telephone system in the city of Langdon under the provisions of an ordinance of the city council granting them the right to do so under prescribed restrictions, and the poles and wires are erected under the supervision of the committee on streets and alleys, as appointed by said council, and in pursuance of said ordinance. The plaintiff applied for a preliminary injunction to restrain the defendants from proceeding with the erection of such poles and the operating of the telephone system until plaintiff had been duly com-



pensated for damage done to his property. The trial court issued an order to show cause <sup>291</sup> why the defendants should not be so restrained. A hearing was had upon such order, based on affidavits presented by the parties. On motion of the defendants, the order to show cause was dissolved and the preliminary injunction refused on the ground that the facts shown did not show that the plaintiff was entitled to the relief sought. The plaintiff has appealed to this court from such order denying his application for a preliminary injunction. The defendants contend in this court that the plaintiff is not entitled to relief by injunction as he has a plain, speedy, and adequate remedy at law, the defendants not being shown to be insolvent or unable to respond in damages. This question will be considered and decided after a decision of the other question in the case.

The main question involved—the use of the streets of a city for the poles and other equipments of a telephone system, without compensation to the owners of the lots abutting on the streets—is one of difficulty to determine, and one of vast importance and far-reaching consequences. Upon a question of such magnitude, and practical interest to almost every citizen of the state, as well as to almost every municipality, it is to be regretted by this court that counsel deemed it advisable to abandon the privilege of an oral argument, and to submit the questions raised on written briefs. However, the subject of the action is not a new one, and has frequently been before the courts of many jurisdictions. True, the decisions of such courts are not harmonious. Still, every phase of the principle contended for in this case has been affirmed in learned decisions by courts of the highest standing, and likewise disaffirmed by other courts of equal standing, in opinions showing equal ability and learning.

Before entering upon a decision upon the merits, a statement of a few material facts is advisable: The original plat of the city of Langdon, as filed by the original proprietors, dedicates and gives the streets and alleys of said city for public use. The ordinance of said city granting the telephone franchise to the defendants for fifteen years is silent upon the subject of compensation to abutting or other lot owners for damages by reason of the occupation of the streets by defendants for telephone purposes, and is silent as to condemnation proceedings therefor. Under section 5956 of the Revised Codes, the right of eminent domain may be exercised in behalf of

several enumerated public uses, among them being telegraph and telephone lines. The question involved, as considered by this court, is that of the occupation of the streets by the defendants for telephone purposes, and not that of the direct or actual occupation of the plaintiff's lots by said company for said purposes, outside of street occupation. Certain conceded principles of law applicable to the questions involved in this case may be stated. The constitution of this state provides that private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner. The legislature has the power, by general laws, <sup>292</sup> to regulate the uses to which the streets may be subjected as against the public. City councils in this state have been granted the power to regulate or prevent the use of the streets for telegraph and telephone poles: Rev. Code, sec. 2148. Prior to the adoption of the Code of 1895 the regulation of telephone systems and their construction was governed by section 3025 of the Compiled Laws, enacted in 1885. A telephone system is classed under the statute as one of public use: Rev. Codes, sec. 5956. Chapter 35 of the Code of Civil Procedure provides that private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and further provides the means and procedure under which such damages may be ascertained. The plaintiff in this case is the owner of the fee in the lot to the middle of the street, and entitled to the beneficial use thereof, subject to the easement or limited fee of the public in the street for its use for public purposes. In this case the absolute fee of these lots was never in the city, and it has simply an easement or a limited fee therein. In *Northern Pac. Ry. Co. v. Lake*, 10 N. Dak. 541, 88 N. W. 461, this court decided "that the public has only an easement in streets and highways, the fee remaining in the original owner or his successor, and that such owner may exercise such acts of ownership thereto as are not inconsistent with the easement." In that case there was no dedication by plat. In the case at bar there was one. However, in construing section 2422 of the Revised Codes, which declares the effect of such dedications, we hold that a proprietor who dedicates by plat does not convey an absolute fee to the public, but reserves the whole estate and title, except the limited fee conveyed to the public for the designated and intended use.

The question to be decided on this appeal is, Is the plaintiff entitled to recover damages from the defendants by reason of their placing telephone poles on the streets directly in front of his lots and residence? If these telephone poles are lawfully placed on lots which he owns subject to the easement of the public, and none of his rights have been violated, he is not entitled to damages. There must be some infringement upon his statutory or constitutional rights before compensation shall rightfully belong to him. If the city of Langdon and the defendants have pursued the course laid down by the law, and no constitutional right has been invaded, then the plaintiff has no just cause for complaint in any court. On examination of the question, with this principle in view, we find that the defendants were engaged in constructing this telephone system, and using the streets on which plaintiff's lots abutted, under the sanction of legislative authority. Defendants were granted a franchise to do this work, and the same could not, without difficulty and hardship, be completed without placing poles in the streets and alleys of the city. A telephone system is a public benefit to the people, although the objects of its construction in this and all other cases is that of private gain. The fact that the telephone is a public benefit and use does not <sup>293</sup> give to the owners any right to occupy or use private property without the owner's consent, unless condemnation proceedings are regularly instituted and prosecuted to judgment. The fee title to the street in front of plaintiff's dwelling-house being in the plaintiff, except for street purposes, he owns the lot to the middle of the street, subject to the rights of the public, to the same extent as he owns the portion of the lot on which his dwelling-house stands. He alone is entitled to all uses of the lot, except the rights of the public by virtue of the dedication of the part in the street to the public, but is entitled to no use thereof inconsistent with or antagonistic to the purposes and uses for which it was dedicated to the public. The plaintiff's right to the beneficial uses of the street, subject to the rights of the public, is a property right, entitled to the law's protection whenever unlawfully infringed on, and, like all property rights, is within the protection of the constitution: Dillon on Municipal Corporations, sec. 656. "The abutter has the exclusive right to the soil, subject only to the easement of the right of passage in the public, and the incidental right of properly fitting the way for use. Subject only to the public ease-

ment, he has all the usual rights and remedies of the owner of the freehold": Elliott on Roads and Streets, 519.

This brings us to real questions in this case: To what public purposes were the streets originally dedicated? Is the use of the street for telephone posts and wires within the purposes of the original dedication to the public by the original proprietors?

The primary use of a street or highway is confined to travel or transportation. Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place. The same idea is expressed by courts and text-writers, that "motion is the primary idea of the use of the street." The defendants claim that the use of the streets for telephone poles is within the use contemplated, as it facilitates the transmission of intelligence, and makes intercommunication between persons possible without the use of the street, and thus lessens travel by persons on the streets, and thereby renders travel thereon free from the annoyance and inconvenience of crowded streets. There is force in the contention, and several courts have adopted the view that the use of poles for such purposes is within the purpose of the original dedication, and therefore not a new use nor an additional burden on the street, because such use pertains to travel on the street. That it lessens travel on the street is admitted. That, however, is hardly the test. The question is, Does it lessen travel on the street by such means as cause a permanent obstruction of the street for a purpose not within the original dedication? The plaintiff is entitled to free access to his house, and to light and air for his house, without obstruction. If for any public <sup>294</sup> purpose inconsistent with the grant to the public of the use of the street, the street is obstructed in front of his lot abutting on such street, such use entitles him to compensation. If within the original purpose, and he is not obstructed in gaining access to his lot or building, and not deprived of light or air, he is not entitled to relief or to compensation. The city had the right to authorize the defendant to construct a telephone system in the manner described, if it did not infringe upon any of the property rights of the plaintiff to the street by virtue of his ownership of the lot. Neither the city council nor the legislature could deprive the plaintiff of compensation for his prop-



erty rights in such lot, if the telephone poles set thereon are not a use of the street, within the purposes for which the easement was originally conveyed to the public. The legislature cannot deprive the plaintiff of his property rights without his consent and without compensation. The constitution prohibits such taking or damaging of his property, even for public purposes, without first procuring his consent or first compensating him. The legislature may authorize the use of the easement of the public in the street, but not to the damage of the owners of real estate fronting on such street, unless condemnation or consent or compensation is first made or given. The streets of said city were given to the public for public use. What is understood by "public use"? The primary intention and idea of the use of the street was for travel—moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or mode of travel is not restricted to those known or in use at the time of the dedication, but may be those modes of travel that are the result of modern inventions. The new modes of travel must not interfere with the property rights of the abutting owner, nor with the use of the street in all other ways by the public, as contemplated or existing at the time of the dedication or later. The fact that the statute designates the telephone as a public use does not authorize the use of the streets by it without restriction. If the use of the telephone on the streets interferes with travel, or is inconsistent with the use of the streets for travel, as originally dedicated, or is injurious to the property rights of abutting owners, the legislature may authorize it to be placed on the streets, but cannot in any manner deprive the abutting owner of his property rights, nor deprive him of the right to compel payment for the use or damage of his property.

The courts have frequently passed upon the question whether the use of the streets for telephone purposes is an additional servitude or burden to that understood as a proper street use. Those holding that it is not a street use, in its proper acceptance, are: In *Krueger v. Wisconsin Telephone Co.*, 106 Wis. 96, 81 N. W. 1041, that court says: "A street may subsist, and the lot owner have the complete use of his adjacent property. Not so if a portion of the street has been permanently taken for poles or other necessary structures for <sup>295</sup> a telegraph or telephone line. No one doubts but that private rights are affected by the construction and maintenance of such a line in a way entirely different from the ordinary use of the highway. Nor

is there room to dispute the fact that such construction constitutes a permanent occupancy of the land, independent of the public use. This occupancy being for the direct benefit of private corporations, and only for the indirect benefit of the public, how can it be said, with any show of justice, that when land is condemned for a street the public must not only pay for its use, but also for the use of such quasi public corporation as the legislature have given the power to use the highway." In *Eels v. American Tel. etc. Co.*, 143 N. Y. 133, 38 N. E. 202, that court said, in a case involving the use of a rural highway: "We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as a newly discovered method of exercising the old public easement, for the very reason that this so-called new method is a permanent, continuous, and exclusive use and possession of some part of the public highway itself, and therefore cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of locomotion. . . . Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession—a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway." In *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453, that court said: "In the same sense the construction of a line of telegraph on the highway is an additional servitude to which the fee of the land had not before been subjected. The servitude differs more in degree than in character, and, whether the damages are great or small, the corporation asking for or appropriating to itself the benefit of such new servitude must make just compensation to the owner of the fee." In *Chesapeake etc. Teleph. Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690, the court said: "To what extent, then, does the statute justify the action of the appellant, and protect it from liability? The planting of a telegraph or telephone pole in a highway or street is not a public nuisance, because the legislature has declared that it shall not be, but the general assembly was powerless to subject the reversionary interest in the bed of such highway or street to an additional servitude without making appropriate provision for just compensation to the owner." In *Jaynes v. Omaha St. Ry. Co.*, 53 Neb. 631, 74

N. W. 67, that court said: "It is very generally held that telegraph and telephone poles in city streets or rural highways entitle the abutting property owner to compensation. . . . The principle upon which all these cases rest is the sound one that the highway or street is dedicated to the public to pass and repass thereon, and that the erection of poles in the streets by the <sup>296</sup> telephone or telegraph companies is a permanent and exclusive occupation of the streets by such companies, to the continued exclusion of the remainder of the public, and to that extent is a continued obstruction of the street." In *American etc. Tel. Co. v. Smith*, 71 Md. 535, 18 Atl. 910, that court said: "A telegraph or telephone company is subject to the provisions of the constitution of Maryland, article 3, section 40, which provides that private property shall not be taken for public use without just compensation; and the averment in a bill for injunction that such a company is proceeding or threatens to proceed to construct its lines of poles and wires over complainant's land without his leave, and without paying or tendering him compensation, is sufficient to entitle him to an injunction." In *Western Union Tel. Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 109, that court said: "It is true that the use of a telegraph company is a public use. That company is a public corporation, as to which the public has rights which the law will enforce, but these public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally. It is for the private profit of the corporation. . . . There is no reason in law or in common justice why it should not pay for what it needs in the prosecution of its business." In *Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559, 24 Am. St. Rep. 290, 9 South. 356, that court said: "A city cannot grant to a telegraph company the right to erect its line along a public street without first making compensation to the abutting property owners, since the line is an additional burden." In *Broome v. New York etc. Teleph. Co.*, 42 N. J. Eq. 141, 7 Atl. 851, it is said that "it is enough to say on that head that it does not appear that the road board had any power to authorize anyone to set up poles in the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned." In *Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. 859, the court said: "And this principle exhibits in a very clear light the reason why it has been held that the placing of telegraph and tele-

phone poles in a street imposes an additional servitude upon the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence." In *Metropolitan Tel. etc. Co. v. Colwell Lead Co.*, 67 How. Pr. 365, that court said: "I am clearly of the opinion that such a use of the street is not a street use, and does not come within the terms of the trust upon which the city holds the fee, and that, so far as the rights of the abutting owners are involved, the legislature has no power to authorize plaintiffs to use the street for such purpose." Joyce on Electric Law, section 321, says: "After a careful examination of the cases in which this question has arisen, and of the many thorough discussions contained in the opinions of such cases, and of the rules of law applicable thereto, we are of the opinion that the construction of telegraph and telephone <sup>297</sup> lines upon the highways or streets is not within the original purposes of the dedication or taking of the same, and that the poles and wires constitute an additional servitude entitling the original owner to compensation." 2 Dillon on Municipal Corporations, section 698a: "On the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended as it may be, especially in cities, with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof." Lewis on Eminent Domain, says: "The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, but are entirely foreign to its use. Where the fee of the street is in the abutting owner, he is clearly entitled to compensation for the additional burden placed on the land." Elliott on Roads and Streets says: "We are inclined to the opinion that such a use constitutes a new burden for which the owner of the fee is entitled to compensation." Croswell on the Law of Electricity, section 110, says: "The use of the highways, however, for the transmission of intelligence, is a use wholly different from public travel. Incidentally, no doubt, it affects somewhat similar objects. . . . The nature of the use, however, is essentially different, and the courts have generally recognized this difference." See, also, as favoring the same principles, *Pacific etc. Cable Co. v. Irvine*, 49 Fed. 113; *Daily v. State*, 51 Ohio St.



348, 46 Am. St. Rep. 578, 37 N. E. 710; Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365. The following cases are authority for a doctrine directly the reverse of that enunciated in the cases and text-books cited: *People v. Eaton*, 100 Mich. 208, 59 N. W. 145; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Cater v. Northwestern etc. Exchange Co.*, 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. 111; *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Hershfield v. Rocky Mountain Bell Tel. Co.*, 12 Mont. 102, 29 Pac. 883; *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358, 49 N. E. 951.

This brings us to the final question in the case: Is the plaintiff entitled to an injunction? The defendants contend that he is not, because he can resort to an action for damages, and thereby be fully compensated for whatever damages he has or may suffer. That such is the general rule is, without doubt, true. It is also a general rule that a wide discretion is vested in trial courts when granting or refusing preliminary injunctions, and that appellate tribunals will hesitate before interfering with the exercise of such discretion by trial courts. But we have reached a conclusion that the facts of this case place it beyond the application of these ordinary rules. The defendants are proceeding to damage the plaintiff's property without first complying with a mandatory provision of the constitution. That provision <sup>298</sup> of the constitution is peremptory that property taken or damaged for public use shall first be paid for, and the legislature has also enacted that payment must precede the taking or damage, and has provided adequate means for establishing the amount of such damages. The taking or damaging of private property for public use without the owner's consent is deemed so serious that payment therefor is a prerequisite to attempting to do so. The defendants have the ultimate right, under their franchise, to use the street for telephone purpose; but payment of damages, actual or consequential, to plaintiff's property, must be first attended to. This does not mean that it may first be appropriated, and paid for at the end of a suit for damages, but means that payment must precede the taking or damaging. Judge Brewer, in *McElroy v. Kansas City*, 21 Fed. 261, said: "When the defendant has the ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle

lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury to the complainant was great or small, but have contented themselves with holding that, as the defendant had full means for ascertaining such compensation, it was his first duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined." In *Searle v. City of Lead*, 10 S. Dak. 405, 73 N. W. 913, it is said: "But the framers of our organic law deemed it proper to fully protect the rights of the abutting property owner in the constitution itself, and not leave him to the sense of justice' by which a community is supposed to be governed. . . . The constitutional provision is unquestionably a wise and just one, and well calculated to protect property owners from injustice and wrong on the part of municipal or other corporations or individuals invested with the privilege of taking private property for public use, and should be given a liberal construction by the courts in order to make it effectual in the protection of the rights of the citizen." The principles enunciated in these cases are equally as applicable to the facts of the case at bar as to the facts of those cases, and the right to a preliminary injunction was sustained in each of them. "When, however, an action is had for this purpose there must be kept in view that general as well as reasonable and just rule that whenever, in pursuance of law, the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. <sup>299</sup> . . . . So, if a statute vests the title to lands appropriated in the state or in a corporation, on payment therefor being made, it is evident that, under the rule stated, the payment is a condition precedent to the passing of the title": *Cooley's Constitutional Limitations*, 654. See, also, *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629; *Theobald v. Louisville etc. Ry. Co.*, 66 Miss. 279, 14 Am. St. Rep. 564, 6 South. 230; *City of Omaha v. Kramer*, 25 Neb. 489, 13 Am. St. Rep. 504, 41 N. W. 295; *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Church v. Joint School Dist.*, 55 Wis. 399, 13 N. W. 212.

Under these cases, and the principles there sustained, we hold that the occupancy of the plaintiff's property for the purposes intended was a violation of the rights of the plaintiff guaranteed him by the constitution and the statutes, for the prevention of which a preliminary injunction should have been granted. The possession taken for such purposes was in the nature of a continuing trespass. A multiplicity of suits must necessarily follow before adequate compensation could be awarded for such continued invasion of plaintiff's property rights. In view of these considerations, the remedy at law would be inadequate: 1 High on Injunctions, sec. 708; *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96, 81 N. W. 1047. It is contended that to grant preliminary injunctions in such case will seriously retard public improvements, and delay the advantages to be derived therefrom to the public. We do not understand that it would to any serious extent. If those desiring to use private property for public use will follow the provisions of the law and the constitution, before endeavoring to use such private property, the delays or difficulties will be but slight.

Our conclusion is that the placing of the poles in the street in front of plaintiff's dwelling-house in this case is an occupancy of the street inconsistent with the dedication of the street for the use of the public for travel; that it constituted an additional burden or servitude upon the street, not within the purposes of the dedication; that the public has an easement in the street for travel and passage thereon by any means not inconsistent with the rights of abutting property owners; that the placing of these poles in this street is an interference in some degree with travel on the street, and also encroaches upon the plaintiff's right to the free and unencumbered use of such street for all purposes.

We are not convinced by the argument advanced that the rights of the public and of abutting owners should be subjected to the occupancy of the streets for all public purposes under the new appliances of modern invention, which greatly facilitate communication between citizens of the same city or citizens of different cities. If the persons utilizing these new appliances were the only ones whose rights and interests were to be considered, there could be but one answer to the demand for a liberal construction of the terms of the grant for public use. But on the one hand are the interests of <sup>300</sup> those asking for the unrestricted use of the streets for intercommunication, and the unlimited use of the streets for all such purposes without

compensation. On the other hand is the demand of the abutting property owner that his property be not sacrificed to such uses without compensation. His demand is safeguarded by the constitution expressly providing that his property shall not be taken or damaged without his consent and without compensation. We think the plaintiff's rights are within the provisions of the constitution. We are aware that plaintiff's damages cannot be large in the present case. But if two poles may be erected on this street in front of his residence, why not twenty? We cannot sanction the violation of a constitutional provision because the damages may seem insignificant. The constitutional protection is not to be meted out in cases where pecuniary damages are large, and denied if they are small. The protection should follow a violation of any right therein defined. Some of the cases cited pertain to setting of poles in rural highways for telegraph purposes. A distinction is apparent between the use of a rural highway and a street, and is sometimes claimed between the use of the telephone and the telegraph. The cases are cited as analogous in principle to the case at bar. The decision, however, is not intended to cover any questions save the one involved, and that is the use of the telephone as set forth in the pleadings in this case, and any case cited not strictly in point is cited as argumentatively sustaining the contention advanced by plaintiff.

The order of the district court refusing a preliminary injunction is reversed, and that court is directed to grant the temporary relief demanded in the complaint.

All concur.

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*The Decisions* are divided on the question whether the erection of telephone or telegraph poles in a street imposes an additional servitude for which abutting owners are entitled to compensation. There are many cases holding that they do, and that their erection may be restrained, unless compensation is made: See the monographic note to Chesapeake etc. Tel. Co. v. Mackenzie, 28 Am. St. Rep. 229-236; Nicoll v. New York etc. Tel. Co., 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 583; Carpenter v. Capital Elec. Co., 178 Ill. 29, 69 Am. St. Rep. 286, 52 N. E. 973. But a contrary rule seems to prevail as to street railways: Baker v. Selma St. etc. Ry. Co., 135 Ala. 552, 33 South. 685, 93 Am. St. Rep. 42, and cases cited in the cross-reference note thereto.



CASES  
IN THE  
SUPREME COURT  
OF  
OREGON.

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MASON'S ESTATE.

[42 Or. 177, 70 Pac. 507.]

**EXECUTORS—Debts Due From.**—At the common law the appointment by a testator of his debtor as executor operated as a release of the debt, except as to creditors. (p. 735.)

**EXECUTORS and Their Sureties, When Answerable for Debts Due to Decedent.**—An executor, though insolvent, must account for a debt due from him to his testator under a statute declaring that the naming of anyone as executor in a will shall not operate to discharge him from any claim which the testator had against him, but the claim shall be included in the inventory, and if the person so named afterward takes upon himself the administration of the estate, he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable, and he must, in the final settlement of his accounts, be discharged therewith as for money in his hands. (pp. 736, 737.)

**EXECUTORS, Liability of—Statute, When Does not Limit.**—The provisions of a statute declaring that an executor is chargeable with all property of the estate that may come into his possession at the value of the appraisement contained in the inventory, and shall not be accountable for the debts of the estate if it appear that they remain uncollected without his fault, does not relieve him from liability for debts due from him to the decedent, though he is insolvent. (p. 739.)

Weatherford & Wyatt and J. H. Wilson, for the appellant.

R. E. Bryson, for the respondents.

**178 BEAN, J.** This is an appeal from a decree of the circuit court for Benton county disallowing certain items in the final account of the appellant as executor of the last will and testament of Peter W. Mason and Hannah R. Mason, his wife, deceased, and charging him with the amount of a promissory

note executed and delivered by him to Peter W. Mason in his lifetime. Akin was insolvent at the time of his appointment as executor, and has ever since continued in that condition, and wholly unable to pay the note, or any part thereof. The respondents, who are creditors of the estate, contended and the circuit court held, that notwithstanding Akin's insolvency, he should be charged in the settlement of his final account with the amount of such note and interest as so much money in his hands. The soundness of this view was the only question argued by appellant's counsel, and is the only one presented for our determination on this appeal. Without further statement of the facts, we shall proceed to its consideration.

It may be stated generally that at common law the appointment by a testator of his debtor as executor operated as a release or extinguishment of the debt, except as to creditors, because his appointment to the office suspends the action for the debt, and a personal right once thus voluntarily surrendered is forever gone: 2 Williams on Executors, 625, 626; 2 Woerner's American Law of Administration, 2d ed., sec. 311. In some states of this country, however, the equitable rule that the appointment of a debtor as executor does not release the debt has been adopted, and, in the absence of a statute, the doctrine is promulgated that debts due a decedent's estate from the executor or administrator are to be deemed and accounted for by him as so much money in his hands, for the reason, as said by the supreme court of Massachusetts, in 1814, in *Stevens v. Gaylord*, 11 Mass. 256, where the rule was first announced: "As soon as the debtor is appointed administrator, if he acknowledges <sup>179</sup> the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor, and the same reason applies to an administrator, as the same hand is to receive and pay, and there is no ceremony to be performed in paying the debt, and no mode of doing it, but by considering the money to be now in the hands of the party in his character of administrator": See, also, *Winship v. Bass*, 12 Mass. 199; *Jacobs v. Morrow*, 21 Neb. 233, 31 N. W. 739; *Miller v. Irby*, 63 Ala. 477; *Thompson v. Thompson*, 77 Ga. 692, 3 S. W. 261. There is some conflict in the authorities, however, as to whether, in the absence of a statute, an executor should be charged for the amount of the debt owing from him to the estate, if he was and is in fact insolvent: See *Leland v. Felton*, 1 Allen, 531; *Spurlock v. Earles*, 8 Baxt. 437; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178; *Twitty v. Houser*, 7

Rich. 153; *State v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Tracy v. Card*, 2 Ohio St. 431; *Wright v. Lang*, 66 Ala. 389; *Arnold v. Arnold*, 124 Ala. 550, 82 Am. St. Rep. 199, 27 South. 465; *Harker v. Irick*, 10 N. J. Eq. 269; *Terhune v. Oldis*, 44 N. J. Eq. 146, 14 Atl. 638; *Garber v. Commonwealth*, 7 Pa. St. 265; *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5.

For the purpose of setting the question at rest, the effect of the appointment by a creditor of his debtor as executor, together with the liability of the executor for a debt due from him to the estate, has been regulated by statute in a majority of the states. The statutes of some declare that the appointment shall not operate to extinguish the debt, "but it shall be assets" in the executor's hands. Under such a provision, the general holding is that a debt due from an executor is placed on the same footing with debts due the estate from other sources, and he and his surties are only required to account for the actual value thereof: 2 *Woerner's American Law of Administration*, 2 ed., sec. 311. Such are the cases of *McCarty v. Frazer*, 62 Mo. 263, and *State v. Gregory*, 119 Ind. 503, 22 N. E. 1, cited by appellant. Other statutes not only provide that the debt shall not be extinguished, but that the executor shall <sup>180</sup> be liable therefor as for so much money in his hands, and such is our statute. Section 1117 of *Hill's Annotated Laws* provides that "the naming any one executor in a will shall not operate to discharge such executor from any claim which the testator had against him, but the claim shall be included in the inventory; and if the person so named afterward take upon himself the administration of the estate, he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable; otherwise he is liable for such claim as any other debtor of the deceased." The language of this section is plain and free from doubt, and the courts, with one accord, hold that under such a statute an executor, though insolvent, is bound to account for a debt due from him to the estate, and shall be charged therewith on settlement of his final account, as for so much money in his hands from the time the claim became due and payable: *Baucus v. Stover*, 89 N. Y. 1; *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231; *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20; *Lambrecht v. State*, 57 Md. 240. The supreme court of New York, in *Baucus v. Stover*, 89 N. Y. 1, says: "It was the obvious purpose of the statute not only to save the executor's debt from extinguishment, but, in order to obviate all difficulty, doubt, and embarrassment, to cause it to be regarded as money

in his hands. Such is the plain reading of the statute. The language is free from doubt and ambiguity, and needs no construction or interpretation. If it had been intended simply that the debt should be placed upon the footing of any other debt due the deceased, and merely to save it, for what it was worth, from extinguishment, the section could have stopped at the word 'inventory,' and the balance thereof would have been without any purpose or meaning. But it goes further. It not only provides that the debt shall not be discharged, and shall be included in the inventory, but it also provides that the debtor executor shall be liable for the debt as for so much money; and not only that, but that he shall apply and distribute the money in the payment of debts and legacies, and among the next of kin. We perceive no room for doubt. The statute says the debt shall be <sup>181</sup> treated as money, and the courts have no right to say it shall not be so treated. This construction will not necessarily involve an insolvent executor in hardship and embarrassment. If a debtor unable to pay his debt is named executor, he may decline to accept the office." And in California (*Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20) it is said that the statute was passed with a view of settling disputed questions as to the liability of an executor and his sureties for debts and demands due or to become due from him to the testator of the estate which he represented, and under it such debt, from the time it becomes due, is to be treated as so much money in the hands of the executor.

The supreme court of Ohio, in speaking on the same subject, says: "The language includes all executors indebted to their testator, imposes the same duties upon all alike, and applies the same rule to all, without distinction between those that are solvent and those that are insolvent, or on account of any circumstances or condition whatever. If such distinction or any distinction had been intended, it could easily have been made, and would have readily occurred to the legislative body, especially in view of the previous decisions of the court establishing the same rule declared by the statute. The failure to make the distinction suggested would therefore seem to have been intentional, but, if it were not, the courts cannot supply the omission without a manifest encroachment upon the province of the legislative body": *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231. And the Maryland supreme court says (*Lambrecht v. State*, 57 Md. 240): "It was the manifest intention of the act of 1798 to charge the executor absolutely with the debt which



he might owe the testator, as assets in his hands; and, in order to remove all danger of misconstruction, it was provided that in case of his failure to account for the sum due, in the same manner as if it were so much money in his hands, his bond may be put in suit. . . . The legislature did not intend to open the door to the inquiry whether the executor has the means and ability to pay his debt, but by express words declares that in all cases his debt shall <sup>182</sup> be treated and accounted for 'as if it were so much money in his hands'; and this without regard to the question whether he is or is not able to pay it—a question which in most instances it would be difficult, if not impossible, for the parties in interest satisfactorily to investigate or to settle." It is clear, therefore, that the solvency or insolvency of the executor is, under our statute, an immaterial inquiry, and that on the final settlement of his account he is to be charged with the amount of any debt due from him to the estate as so much cash in hand from the time it became due. And it can hardly be said that this is an unjust or unreasonable requirement. As an executor cannot sue himself, all resort to legal process for the collection of a debt due from him to the estate is cut off by his assuming that office. By a proceeding which the beneficiaries of the estate are powerless to prevent, he has deprived them of the ordinary processes of the law for enforcing the payment of his debt. Having voluntarily taken upon himself the right and duty to demand and receive, and the corresponding duty of paying, it is but a just and legal consequence of his own act that his debt should be conclusively presumed to have been paid and discharged.

Every reason for this doctrine is strengthened when liability on the ground of the executor's insolvency is sought to be evaded. That is a matter which the beneficiaries of the estate are entitled, under every principle of right and justice, to have determined by the ordinary processes of the law in a proceeding where the debtor does not occupy the conflicting relations of a representative of the estate charged with the duty of diligence in its behalf, and a debtor whose interest it would be to avoid payment. An inquiry of that nature in the county court, sitting for the transaction of probate business, would necessarily be attended with innumerable difficulties, and would be an unsatisfactory and imperfect substitute for the remedies ordinarily afforded for the collection of debts. For the purpose of settling all these questions, and obviating the difficulties suggested, the statute has provided, in plain and unmistakable terms, that, if

the debtor takes upon himself the administration <sup>183</sup> of the estate, he shall be liable for any debt due from him, "as for so much money in his hands at the time" it became due and payable. Nor is the effect of this provision modified by those of sections 1176 and 1177 of Hill's Annotated Laws, that an executor is chargeable with all the property of the estate that may come into his possession, at the value of the appraisement contained in the inventory, and "shall not be accountable for the debts due the estate, if it appears that they remain uncollected without his fault." Debts due from the executor are by force of section 1117, in legal effect, transmuted into money in his hands, and cannot be classed with property of the estate coming into his hands, or with uncollected or uncollectible debts, within the meaning of the section referred to: *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231.

Whether the debt of an insolvent executor, converted by the statute into money, for the purpose of administration, stands on the same footing in regard to his sureties as if the executor had actually received so much money belonging to the estate, is a question not presented nor decided by this appeal. We are of the opinion that the executor was properly charged with the amount of the debt due from him to the estate, as so much money, and, as that is the only question for decision, the decree of the court below is affirmed.

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*When Letters are Granted to an Administrator* who owed his intestate at the time of the latter's death, the debt is thereby extinguished, and becomes money in his hands, for which he and his sureties are accountable without reference to his solvency or insolvency: *Arnold v. Arnold*, 124 Ala. 550, 27 South. 465, 82 Am. St. Rep. 199, and see the cases cited in the cross-reference note thereto.

## ADAMS v. CHURCH.

[42 Or. 270, 70 Pac. 1037.]

**EXEMPTIONS—Timber Culture Claims.**—The provisions of the act of Congress declaring that no land acquired under the timber culture act shall become liable for the satisfaction of any debt contracted prior to the issuing of the final certificate therefor is valid, and absolutely prohibits the seizure of land for the satisfaction of a debt contracted by the donee prior to such issuing. (p. 741.)

**A PARTNERSHIP as Such Cannot Take and Hold the Title to Real Estate.** (p. 742.)

**A CONVEYANCE to a Partnership** passes the title to the individual members as tenants in common. (p. 742.)

**PARTNERSHIP REALTY** is, in America, **Partnership Property Only** so far as it may be necessary for the payment of the debts and the adjustment of the assets of the partnership. The legal title remains in the partners as tenants in common, and when no longer needed for partnership purposes, it is relieved from the trust growing out of the partnership relation. (p. 742.)

**EXEMPTIONS—Timber Culture Act—Partnership Liabilities.** A decree declaring that lands acquired under the timber culture act are partnership property does not remove the conditions annexed to the legal title, and if the property consists of lands acquired by one of the partners under the timber culture act, they remain, as before, exempt from execution for any debt created prior to the issuing of the final certificate, though it is the debt of such partnership. (p. 744.)

**RES JUDICATA.**—A Decree Declaring that Certain Real Property is Held by One of the Partners for the Partnership and is Partnership Property does not establish that it is liable for partnership debts created prior to the issuing of the final certificate, where it is acquired under the timber culture act. (pp. 744, 745.)

Lionel R. Webster and Will R. King, for the appellant.

John L. Rand, Charles H. Finn and Thomas H. Crawford, for the respondents.

**271 BEAN, J.** 1. This is a suit to enjoin the sale of an undivided one-half of one hundred and sixty acres of land in Malheur county to satisfy the debts of a partnership composed of the plaintiff and one R. M. Steel. Prior to November, 1885, the plaintiff made application to purchase the land in controversy under an act of Congress "to encourage the growth of timber on the western prairies," and amendments thereto: 20 U. S. Stats. 113. Shortly afterward he entered into partnership with Steel for the purpose of carrying on the business of farming and stock-raising, under the firm name and style of Steel & Adams. By the terms of the partnership agreement,

plaintiff's timber culture was to be considered as partnership assets, and was to be conveyed by him to the firm as soon as he obtained title from the United States. Thereafter Steel died, and, the plaintiff refusing to comply with his agreement, it was decreed, in a suit prosecuted by Steel's representatives for the purpose of determining the assets of the firm and for its dissolution, that the land in controversy was partnership property, and belonged to the firm: *Church v. Adams*, 37 Or. 355, 61 Pac. 639. The proof of compliance with the provisions of the act of Congress under which the land was taken was made by plaintiff and the final certificate issued to him in 1896. The partnership debts which it is now sought to enforce against the land were contracted prior to that time, so that the sole question for decision is whether the plaintiff's interest in the land can be seized and sold under execution for debts contracted by the firm of which he was a member prior to the issuing of the certificate. The case would be clear if Adams still owned the land in his individual right. The act of Congress under which it was required provides as follows: "Sec. 4. That no land acquired under the <sup>272</sup> provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor": 20 U. S. Stats. 114. This is a valid provision, and a condition annexed to the grant which Congress was authorized to make, and absolutely prohibits the seizure and sale of the land, against the will of the owner, for the satisfaction of a debt contracted by the donee prior to the issuing of the final certificate: *Nash v. Farmers' Bank*, 3 Kan. App. 694, 44 Pac. 907; *Clark v. Bayley*, 5 Or. 343; *State v. O'Neil*, 7 Or. 141; *Faull v. Cooke*, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; *Wallowa Nat. Bank v. Riley*, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766; *Miller v. Little*, 47 Cal. 348; *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Baldwin v. Boyd*, 18 Neb. 444, 25 N. W. 580; *Brandhofer v. Bain*, 45 Neb. 781, 64 N. W. 213; *Van Doren v. Miller*, 14 S. Dak. 264, 85 N. W. 187; *Gile v. Hallock*, 33 Wis. 523.

2. But it is argued that, when the land became the property of the firm of Steel & Adams by virtue of the decree referred to, the interest of Adams therein was no longer within the provisions of the act of Congress, and thereafter became liable for the debts of the firm, whether contracted before or after the issuing of the final certificate, the same as it would for similar debts of a private individual to whom Adams had conveyed the title. The vice of this position, however, becomes manifest



when it is remembered that the decree does not affect Adams' title to an undivided one-half of the land in any way, except that thereafter he held it in trust for partnership purposes, and subject to the payment of such partnership debts as it might be legally liable for, in preference to his individual liabilities. The title did not pass to the partnership, because a partnership, as such, cannot take or hold the legal title to real estate. It is not a person, either natural or artificial, and when a deed is made to a partnership it passes the title to the individual members thereof as tenants in common: *Kelley v. Bourne*, 15 Or. 476, 16 Pac. 40; 1 *Bates on Partnership*, sec. 296; *Shumaker on Partnership*, 202. In England partnership realty is in equity <sup>273</sup> deemed personalty for all purposes; but, under the American doctrine, it is, even in that forum, regarded as personal property only so far as may be necessary for the payment of the debts and the adjustment of the partnership assets. For such purposes, it is considered as personal property, and governed by the rules and general doctrine applicable to that species of property. But this is not an arbitrary rule, by which real estate, when it is once owned and possessed by a partnership, is transmuted by a court of equity into personal property for all purposes. It still retains all its characteristics as real estate, and must be owned and conveyed as such. The ground of the doctrine is the special interference of equity in favor of commerce, whereby the trust in favor of the partnership is separated from the legal estate, and made subject to the rules applicable to the personal property of a partnership, so far as it concerns the partners in relation to each other, or those in privity with them. It is only when necessary to protect the equitable rights of creditors and the respective partners, or when otherwise required by the exigencies of the partnership, that it is so considered by a court of equity. The legal title is at all times held by the copartners as tenants in common, and, when no longer needed for partnership purposes, it is released from all trusts growing out of the partnership relation; and, if each partner's legal title corresponds to his interest or share in the partnership, equity will not interfere to convert it into personalty, but it will descend to the heirs of the respective partners, as in the case of any other tenancy in common.

"The clear current of the American decisions supports the rule," says Mr. Chief Justice Andrews in *Darrow v. Calkins*, 154 N. Y. 503, 61 Am. St. Rep. 637, 49 N. E. 61, "that in the

absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty, with all the incidents of that species of property, between the partners themselves, and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other <sup>274</sup> partner—that, so far as is necessary, it shall be first applied to the adjustment of partnership obligations, and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes, the character of the property is, in equity, deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion, and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation”: See, also, 1 Bates on Partnership, sec. 279; 1 Lindley on Partnership, 2d Am. ed., \*332, note; Shumaker on Partnership, 216; 17 Am. & Eng. Ency. of Law, 1st ed., 952; Shearer v. Shearer, 98 Mass. 107; Black v. Black, 15 Ga. 445; Lang v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Goldthwaite v. Janney, 102 Ala. 431, 15 South. 560, 48 Am. St. Rep. 56, and note. It is accordingly held in many jurisdictions that a partner is entitled to claim the benefit of the local exemption or homestead laws out of partnership property, even as against partnership creditors, on the theory that the property of the firm is owned by the individual members: Skinner v. Shannon, 44 Mich. 86, 38 Am. Rep. 232, 6 N. W. 108; Stewart v. Brown, 37 N. Y. 350, 93 Am. Dec. 578; Evans v. Bryan, 95 N. C. 174, 59 Am. Rep. 233; Ferguson v. Speith, 13 Mont. 487, 40 Am. St. Rep. 459, 34 Pac. 1020; Moyer v. Drummond, 32 S. C. 165, 17 Am. St. Rep. 850, 10

S. E. 952; *Blanchard v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474; <sup>275</sup> *Dennis v. Kass*, 11 Wash. 355, 48 Am. St. Rep. 880, 39 Pac. 656.

3. Now, the only effect of the decree requiring Adams to convey the property to the partnership was to change his half thereof from individual to partnership property; but it did not remove any of the conditions annexed to his legal title, nor make it liable for any debts contracted by him, either as an individual or as a member of the firm, prior to the issuing of the final certificate; nor did it place the title, so far as his interest is concerned, beyond the reason of the law prohibiting the sale of the land for debts contracted prior to that time. The same reason that exists for protecting him as an individual, and exempting the land from sale for certain debts, would seem to apply with equal force to him as a member of the firm. The object of the act of Congress is to prevent the sale of a timber culture claim for debts contracted by the applicant prior to the issuing of the final certificate. Neither the creditors of the individual, nor of a partnership to which he may belong, have any rights against such property, and it is no hardship to enforce the exemption as against them. The debts of the partnership are of the debts of each of the partners personally, which can be enforced against their individual property, and there is no more reason why the interest of one member of the firm in the partnership property should not come within the provisions of the federal statute than if the sole title belonged to him.

4. It is contended, however, that the judgment or decree in the case of *Church v. Adams*, 37 Or. 355, 61 Pac. 639, is a conclusive adjudication of the question sought to be determined on this appeal. It has often been said, and is familiar law, that a judgment or decree of a court of competent jurisdiction is conclusive between the parties, not only as to all matters actually litigated, but also as to such as might have been litigated. But the question as to whether the property decreed to be conveyed by Adams to the firm would be liable for the firm debts, and, if so, in what case and under what circumstances, was not involved in the former suit, nor could it have been <sup>276</sup> litigated or determined therein. It would have been no defense to that suit for Adams to set up the fact that the land was a timber culture claim, and not liable for any debts of the firm that had been contracted prior to the issuing of the final certificate therefor. Such an inquiry would have been wholly foreign to the purposes of the suit. Its object was to determine whether the

property belonged to the firm, and that was the only issue that could have been presented or adjudicated. The decree therein is therefore in no sense a bar to this suit. It follows that the decree appealed from must be reversed, and one entered here as prayed for in the complaint.

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*Lands Entered Under the Federal Homestead law* are not subject to attachment or execution for debts contracted before the issuance of a patent: *Weber v. Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400; *Wallowa Nat. Bank v. Riley*, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766.

*Partnership Real Estate* and its liability for the demands of creditors are discussed in the monographic notes to *Page v. Thomas*, 54 Am. Rep. 792-800; *Goldthwaite v. Janney*, 48 Am. St. Rep. 62-77. See, also, the subsequent cases of *State v. Sixth Judicial Dist. Court*, 22 Mont. 449, 74 Am. St. Rep. 618, 57 Pac. 89, 145; *Darrow v. Calkins*, 154 N. Y. 503, 61 Am. St. Rep. 637, 49 N. E. 61; *Brady v. Kruger*, 8 S. Dak. 464, 59 Am. St. Rep. 771, 66 N. W. 1083; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490, 64 N. W. 334; *Stover v. Stover*, 180 Pa. St. 425, 57 Am. St. Rep. 654, 30 Atl. 921.

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## WILLIAMS v. WILSON.

[42 Or. 299, 70 Pac. 1031.]

**THE PURPOSE** of a Decree Foreclosing a Mortgage is to conclude all parties to the record and bind them by the decree. It determines and declares priorities and preferences and marshals assets, and necessarily merges all liens involved in the decree, and thenceforth, if it is sought to subject the property to the payment of any of these distinct liens, it must be done under the decree in accordance with its directions, and by virtue of process provided for its enforcement. (p. 750.)

**FORECLOSURE.**—A Judgment Creditor Who is Made a Party to a Decree of Foreclosure cannot afterward take out execution on his judgment and thereunder sell the property which was the subject of such decree, though after the sale under the decree the property was redeemed by a grantee of the mortgagor. (pp. 750, 751.)

**AN INJUNCTION** May Issue to Prevent a Judgment Creditor Who is a Party to the Decree of Foreclosure which provided for the sale of the mortgaged premises and the application of the proceeds to the payment of the mortgage, and the satisfaction of such judgment, from taking out execution and selling the same property under his original judgment. His only remedy is under the decree. (p. 751.)

Suit to enjoin the sale of real property under execution. This property, while it belonged to O. D. Taylor, was mort-



gaged by him to W. H. Wilson, and subsequently conveyed to the plaintiff on July 27, 1893, under a conveyance not recorded until July 27, 1895. In November, 1894, a suit in foreclosure was commenced. At the time Joseph A. Johnson held judgments which were liens on the premises, and he was made a defendant in the suit under the allegation that he claimed some interest which was subsequent to the mortgage. He filed an answer and cross-complaint setting out his liens and his rights thereunder, and by a decree entered in May, 1895, the property was directed to be sold and the proceeds of the sale to be applied, first, to the payment of the expenses of the sale and the mortgage debt, next, to the payment of certain judgments specified, among which were all the judgments held by Johnson. An execution issued on the decree of foreclosure and the property was sold thereunder, but the proceeds of the sale were not sufficient to satisfy all the judgments. Afterward plaintiff in this suit redeemed from the sale. In 1901, one of the judgments which had not been satisfied was assigned to W. H. Wilson, who caused execution to issue thereon and to be levied on the mortgaged premises. The plaintiff then commenced the present suit to prevent further proceedings looking to the sale of the property. The trial court denied all the relief sought, and the complainants appealed.

George H. Wilson and Wood & Linthicum, for the appellant.

W. H. Wilson, for the respondents.

**303 WOLVERTON, J.** Since this case was decided, the respondent has filed an exhaustive brief on petition for rehearing, by which it is urged with signal ability that the determination of the court is untenable and contrary to its former adjudications. We have re-examined the case with the same result as formerly, but have revised the reasons upon which it must rest. This opinion will, therefore, take the place of the former as declarative of the law of the case. The judgment in favor of Johnson, the enforcement of which is sought to be enjoined in this suit, was recovered by him without notice or knowledge of the previous deed from Taylor to the plaintiff, and therefore the plaintiff stands in the same position as if Taylor owned the property at the time of the rendition of the judgment, and he had purchased it after that date. The question for decision, then, is whether a judgment lien creditor, who is a party to a suit to foreclose a prior mortgage, and who comes in by answer

or cross-complaint, and sets up the judgment, and obtains a decree that the proceeds of the sale, after satisfying prior liens, <sup>304</sup> shall be applied in payment of his judgment, can have the mortgaged premises resold under execution issued in the law action for any deficiency due him on his judgment, when the land had been redeemed by a grantee of the mortgagor, who takes subsequent to the rendition of the foreclosure decree. In *Settlemyre v. Newsome*, 10 Or. 446, and *Flanders v. Aumack*, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447, it is held that land sold under an execution issued on a judgment at law, and redeemed by the judgment debtor or his successor in interest, may be resold for an unpaid balance due on the judgment, the amount paid on redemption being considered merely a payment pro tanto. In *Willis v. Miller*, 23 Or. 352, 31 Pac. 827—a case where the mortgaged premises passed into the hands of a stranger to the mortgage prior to the foreclosure—it was held that the premises could not be resold for a deficiency remaining upon the personal decree against the mortgagor after redemption by the holder of the equity of redemption or legal title. In distinguishing this case, we said in *Flanders v. Aumack*, 32 Or. 19, 29, 67 Am. St. Rep. 504, 51 Pac. 447, 450: "Foreclosure is a remedy by which the property covered by the mortgage may be subjected to sale for the payment of the demand for which the mortgage stands as security, and, when the decree is had, and the property sold to satisfy it, the mortgagee has obtained all he contracted for. But if there is also a personal decree against the mortgage debtor, this becomes, from the date of its docketing, a general lien upon his real property, as in case of a judgment; and, if a deficiency remains after the application of the proceeds of the sale of the lands covered by the mortgage, the decree may be enforced by execution, as in ordinary cases: *Hill's Annotated Laws*, sec. 417, subd. 2. The resale does not take place under the order for the sale of the specific property covered by the mortgage lien, for that has been exhausted, but under the personal decree, which remains as a deficiency decree against the mortgage debtor after the application of the proceeds arising under the order of sale; and a redemption will not reinstate the specific mortgage lien, while it will the general lien acquired by the personal decree. <sup>305</sup> This distinction is clear, and is bottomed both upon principle and authority. The redemption is from the sale, and not from the mortgage; and, if the lien of the personal decree has never attached by reason of the mortgagor not having the fee of the property at the time it was ren-

dered, there never existed any lien to be reinstated against his successor in interest, who purchased prior to the decree."

This was by way of argument, and, while it may not have been necessary, strictly speaking, to the decision of that case, yet we think it sound doctrine, and are quite ready to adhere to it now, where it is especially invoked in behalf of respondent as decisive of the present controversy. But we cannot agree with counsel that such is its relevancy and effect. The statute provides how a lien other than a judgment or decree may be foreclosed, which shall be by suit. In addition to the decree of foreclosure, if it appear that a promissory note or other personal obligation has been given by the mortgagor or other lien debtor for the payment of the debt, a decree may be had against him for the amount of such debt, as in the case of an ordinary decree for the recovery of money. Any person having a lien subsequent to plaintiff upon the same property shall be made a party to the suit, and, when it is adjudged that any of the defendants have a lien upon the property, the court shall make a like decree in relation thereto and the debts secured thereby as if such defendant were a plaintiff in the suit; and when a decree is given foreclosing two or more liens upon the same property, or any portion thereof, in favor of different persons, not united in interest, such decree shall determine and specify the order of time according to their priority, in which the debts secured by such liens shall be satisfied out of the proceeds of the sale of the property. If the decree is in favor of the plaintiff only, execution may issue, as in ordinary cases; but, if in favor of different persons not united in interest, it shall issue at their joint request, or the order of the court. When the decree is also against the defendants or any one of them in person, and the proceeds of the property involved by the lien are not sufficient to satisfy the <sup>306</sup> same as to any sum remaining, it may be enforced by execution, as in ordinary cases. In such case, if the decree be in favor of different persons, not united in interest, it shall be deemed a separate decree as to such persons, and may be enforced accordingly: Bellinger & Cotton's Annotated Codes and Statutes, secs. 423-426. It is further provided that "a decree of foreclosure shall have the effect to bar the equity of redemption, and property sold on execution issued upon a decree may be redeemed in like manner and with like effect as property sold on an execution issued on a judgment, and not otherwise" (section 427); and also that "during the pendency of an action at law for the recovery of a debt se-

cured by any lien mentioned in section 423, a suit cannot be maintained for the foreclosure of such lien, nor thereafter unless judgment be given in such action that the plaintiff recover such debt or some part thereof, and an execution thereon against the property of the defendant in the judgment is returned unsatisfied in whole or in part" (section 429).

It is very apparent from these sections of the statute that a judgment lien creditor should be made a party defendant, if it is designed to divest him of any interest he has acquired in the subject of the foreclosure. In *De Lashmutt v. Sellwood*, 10 Or. 319, it was held that such a junior lienholder was not in any way affected by proceedings to foreclose to which he was not made a party, and that his right to sell on execution and convey the title remained unimpaired, and this as against a prior sale under the decree of foreclosure. Springing out of the legal principles and conditions established by this case was another—*Sellwood v. Gray*, 11 Or. 534, 5 Pac. 196—which was a suit brought by the holder of the sheriff's deed under the foreclosure decree against the judgment creditor, who had purchased under execution on his judgment, to require him to redeem from the mortgage, and it was held that such a suit could be maintained; that the purchaser under the ineffectual sale under the decree became subrogated to the position of the mortgagee; and that the judgment creditor should redeem, not under the statute, but <sup>397</sup> by doing equity—that is, paying the amount of the mortgage debt, both principal and interest, or such as remained unpaid, or be forever barred of all interest in the premises. The doctrine is concisely stated in *Osborn v. Logus*, 28 Or. 302, 310, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997, 998, that "a purchaser under such a decree may insist upon a redemption by the lienor not made a party, failing in which such lienor will be thenceforth barred of all interest in the premises"; and it has been reaffirmed in *Koerner v. Willamette Iron Works*, 36 Or. 90, 78 Am. St. Rep. 759, 58 Pac. 863, and *Gaines v. Childers*, 38 Or. 200, 63 Pac. 487. So that a judgment lien creditor not made a party to a suit to foreclose a prior mortgage is in no way affected by the decree. He may have execution issue upon his judgment, and sell and obtain the legal title, notwithstanding the foreclosure. But he may redeem if he desires, or may be compelled to do so, and in either case he must pay the entire mortgage debt and interest under the equitable rule, and not under the statute, as from a sale under the decree.



Now, what is the status of a judgment lien creditor when he has been a party, regularly brought in, and becomes legally subject to the decree of foreclosure? If he desires to perpetuate his lien as it pertains to the particular property involved by the suit, it is plain he must set it up; otherwise he must stand in default, and can get nothing. Whether he is entitled to a personal decree therein, as if he were a plaintiff, is a question we are not now called upon to decide. None such was obtained in the foreclosure involved here. He would have a voice, under the statute, as to the issuance of the execution, but could have none on his own motion, save by the order of the court, unless he should obtain a deficiency decree. In 2 Jones on Mortgages, fourth edition, section 1437, we find this text: "A creditor having a judgment rendered before the sale, but subsequent to the decree, may redeem at any time before the sale by virtue of his lien. But after the sale the right is as effectually barred as if the creditor had been made a party to the proceeding." The redemption must be from the mortgage, <sup>398</sup> but a sale will cut him off from that, and so will he be cut off if he made a party to the proceeding. Of what avail would be a decree, if, notwithstanding, the judgment creditor could have execution issue, and sell under his judgment? There must be some purpose in requiring him to be made a party to the foreclosure suit, and what purpose can be subserved thereby if it denies or curtails none of his rights acquired by his judgment?

The clear purpose, as well as effect, of a foreclosure proceeding under the statute is to conclude all parties to the record, and bind them by the decree. It is, in a sense, a proceeding in rem; strictly so in so far as it determines the status of the property involved by the liens, but not as it relates to a personal decree. It determines and declares priorities and preferences and marshals the assets; that is, determines the order in which the proceeds of the property shall be applied with reference to the various liens when sold, the necessary and inevitable result of which is to merge all liens involved, whether general or special, in the decree; and thenceforth, if it is sought to subject the property to the payment of any of these distinct liens, it must be done under the decree in accordance with its directions, and by virtue of the process provided for its enforcement. The parties can have no remedy or process to enforce their individual liens as they existed prior to the foreclosure, because it cuts them off, and gives them the process provided for the enforcement of the decree where the priorities are determined and

the assets marshaled: *Lauriat v. Stratton*, 6 Saw. 339, 11 Fed. 107. Now, while it may be conceded that the effect of the redemption by Williams as Taylor's successor to the equity of redemption or legal title was to restore the estate and reinstate the general lien for any unpaid balance of any personal decree that may have been rendered in that suit, yet it cannot be effective to vacate the decree and restore Johnson or his successor in interest, the defendant herein, to all his rights under his original judgment, including his right to have execution issue, and to levy it upon the property dealt with in the foreclosure. As to that <sup>309</sup> he has been forever barred; and his general lien, unless he has obtained one in the foreclosure proceedings, cannot avail him for the purpose. He has had his day in court as to the property, and must abide the adjudication, and, unless the property comes again into the hands of his judgment debtor, his general lien by virtue of his original judgment is forever gone.

Counsel, in their brief, put a hypothetical case by supposing that, after the decree in the Flanders foreclosure had been entered, Taylor, the judgment debtor, had paid off the amount due under the mortgage, attorney's fees, and costs, and had also paid all other liens adjudged by the decree, except the one based upon the judgment in question, but failed to pay that, and ask, Would appellant claim, under such circumstances, that the Flanders foreclosure decree had barred or foreclosed the lien of the last-named judgment? We answer that such would logically have been its effect, and, if the defendant herein desired to pursue the property, and obtain satisfaction of his demand out of it, he must have done so by execution in the foreclosure suit, and under the decree therein rendered. The prior demands or liens having been voluntarily satisfied, the defendant could have had his execution to enforce the decree, and have the property applied to the payment of his lien as therein determined; but, the property having been once sold under the decree, and Taylor, or rather his successor in interest, having redeemed, the specific lien is discharged. If, however, the defendant herein had acquired a personal decree in the foreclosure suit, and the same had been regularly docketed, he would have been entitled to an execution upon that, as in ordinary cases, but he can have no execution upon his judgment in the law action, as it has never reattached by the property coming again into the hands of the judgment debtor.

It follows that the defendant should be enjoined from further prosecuting his execution in the law action, and the decree of the court below will be reversed, and one here entered in accordance with the prayer of the complaint.

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*A Decree of Foreclosure* concludes the rights of all parties to the action, and a sale thereunder, consummated by the sheriff's deed, passes, as against them, the entire estate held by the mortgagor at the date of the mortgage: *Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; *Ames v. Stover*, 98 Wis. 372, 67 Am. St. Rep. 813, 98 N. W. 372.

*The Effect of Redemption* from an execution sale as reinstating the lien of the judgment, for the balance remaining due thereon, is considered in the monographic note to *Flanders v. Aumack*, 67 Am. St. Rep. 510-517.

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## COX v. ROYAL TRIBE.

[42 Or. 365, 71 Pac. 73.]

**CORONER'S INQUEST—Admissibility of as Evidence.**—In England coroners' postmortems are admissible as evidence of the status, but are not conclusive, and the like rule prevails in some of the United States. (p. 757.)

**CORONER'S INQUEST as Evidence of Suicide.**—The verdict of a coroner's jury is not admissible in Oregon to prove that the decedent came to his death by suicide. (p. 759.)

**CORONER'S INQUEST Attached to Proofs of Death.**—The record of a coroner's inquest attached to proofs of death made by the beneficiary or his agent in conformity to blanks furnished by the insurer, is admissible in evidence along with such proofs, upon the ground that it is an admission of the beneficiary against his interest as to the cause of death. (p. 760.)

**CORONER'S INQUEST.—When Proofs of Death are Furnished by an Agent of the Insurer** the record of a coroner's inquest is not admissible in evidence because it has been made a part of such proofs. Where, on the death of the insured, the lodge to which he belonged is required to notify the supreme executive council and to furnish proofs of death, proofs so furnished must be deemed to have been furnished by the agent of the insurer. (p. 760.)

**INSURANCE.—The Burden of Proof to Establish that the Insured Died by Suicide** is upon the insurer. (p. 760.)

**INSURANCE.—The Presumption is that the Death of the Insured resulted from a natural cause.** (p. 760.)

**INSURANCE—Cause of Death, When a Question for the Jury.** Unless, upon the evidence, there could not reasonably be two opinions as to the cause of death, the question must be submitted to the jury. (p. 761.)

**INSURANCE—Suicide, Death by, When not Proved so as to Take the Question from the Jury.**—Evidence that the body of the deceased was found floating in an eddy of the river about a mile from the place of her residence; that she had been in ill-health, financially embarrassed and despondent, and had threatened to take her life, does not establish her suicide, so as to take the question from the jury, where there is doubt, from the evidence, whether her threat was seriously made, and there is testimony tending to show that she died from asphyxiation. (p. 761.)

**INSURANCE—Suicide—Instruction.**—In an action to recover on a policy of life insurance, an instruction that suicide is an affirmative defense; that the burden is upon the defendant to establish it by a preponderance of the testimony; that when a person is found dead from unexplainable causes, the presumption is that his death was natural or accidental, if nothing appears to the contrary; that self-destruction is contrary to the general conduct of mankind; that the plaintiff is entitled to recover, unless the evidence tends to overcome this presumption and satisfy the jury that the death was voluntary; that the presumption of law is, in the absence of any evidence as to the cause of death, that it happened from natural causes and did not arise from self-destruction; and that if in the case there is no proof as to the cause or manner of death of the insured, or the evidence as to whether her death was caused by accident or natural causes, and not by her own hands, is equally balanced, the jury should find in favor of the presumption; that the presumption is disputable; and if from all the evidence, the jury finds the preponderance to be that she came to death by her own hands, they must find for the defendant, is not erroneous, and the use therein of the words “unexplainable” and “satisfied” is to define the presumption alluded to, and leaves the jury to say whether there was any proof as to the cause or manner of death. (pp. 762, 763.)

Harry B. Walker, William D. Fenton and Rufus A. Leiter, for the appellant.

Arthur C. Spencer and Chamberlain & Thomas, for the respondent.

**365 WOLVERTON, J.** This is an action by Dean Cox, a minor, by J. P. Finley, her next friend, against the Royal Tribe of Joseph to recover upon a beneficiary certificate for two thousand dollars, issued by the defendant to **366 Capitola Blanche Cox**, a married woman, in favor of the plaintiff, her daughter. Immediately prior to the death of Mrs. Cox, which occurred July 1, 1899, she was engaged in conducting a restaurant at No. 206 Madison street, between First and Front, in the city of Portland. She had been engaged in the business some six weeks or more, and lived in a room adjoining or over the restaurant. Early in May she had a severe attack of la grippe, was attended by a physician, and found to be suffering from intense pain in the head, and was at times, as described by the



physician, "nearly wild." She apparently recovered from this trouble by the last of the month, except that it left her in a nervous condition. It was her habit to rise at 5 o'clock in the morning, or earlier, and do her marketing. On the evening of June 30th, about 9 o'clock, her daughter, who was making her home with J. P. Finley, some two and a half blocks distant, was with her at the restaurant, and testified that her mother walked part of the way home with her; that she said she did not feel like going, had to stop and rest on the way, and was so tired that the witness requested her to return, which she did; that she was with her mother the second day before her decease, and that she was light-hearted; that shortly before her death she had a slight stroke of paralysis, but that it did not amount to anything; that her financial condition was such that she had to call upon some of her friends for assistance, among whom were Miss Anna Finley and Mrs. Green, the latter living at Hamilton avenue, South Portland, from whom she borrowed something like one hundred dollars; that Mrs. Green lived south of where deceased was found, and that she could have conveniently gone that way in going to her place of residence; and that she went to see Mrs. Green frequently, going both in the daytime and the evening. Inez Jenkins testified that she had a rooming-house adjoining the restaurant, and that Mrs. Cox roomed with her occasionally; that witness saw her and talked to her about 10 o'clock, after she had retired, on the evening before her death; that she said she had a great deal of trouble in her restaurant and had just employed a married man and his wife to cook for her; that she spoke of being tired, and <sup>367</sup> complained of the top of her head hurting her, and said that when she laid down at night she wrung a towel out of ice water and put it on her head; that she had been complaining of her head for about three weeks; that she said she thought her business would be prosperous if she only had the means to get ahead, and remarked that she had but little means with which to obtain provisions for breakfast; that she left the room about 5 o'clock in the morning; that at one time previous witness heard her say she had a notion to take a revolver and blow out her brains, but laughed when she said it, and witness thought little about the incident; that she was in the habit of carrying a revolver for self-protection, and, as a rule, she went in the morning to Duffy's market, on the corner of Front and Madison; that on the morning in question the meat was sent over to the restaurant, and that

witness found her purse, after her death, at the restaurant, with a little money in it.

It is further shown that at 7:15 o'clock in the morning of July 1st her body was found floating in an eddy of the river at the foot of Mead street about a mile south of her place of place of business. The river was high, and at the place referred to the water was from four to eight or ten feet deep. It was near the railroad track, along which the old macadamized road ran, which was usually traveled by persons going to and from parts of South Portland. When first seen, her body was ten or fifteen feet from shore, face upward, and her hair loose, and gathered about her face. On the shore, and within a few feet of the water's edge, was found her straw hat, underneath which were deposited her pistol and a note in her handwriting, written with a lead pencil on yellow paper, containing these words and figures, "Mrs. Cox. 206 Madison street," and near by was her cape or cloak. The margin of the river, from the road down to the water, was covered with grass, and the track of a woman heading toward the stream was found at the water's edge, partly covered by the water. Her two account books, tied together with a string, which she was in the habit of carrying with her when marketing, were found in the water near the shore, and the paper upon which the note was written was apparently <sup>368</sup> taken from one of these books. Examination of the body disclosed that the lungs were free from water; that sand was contained in her nostrils, that her lips were of a violet color, and that there were no bruises upon the body, or any indication of violence. Dr. Candiani, the physician who examined her at the morgue during the coroner's inquest, testified that the indications showed that she died from asphyxiation—that is to say, on being submerged she closed her mouth, thereby excluding water from the lungs, resulting in asphyxiation; and that the body had the appearance of having been in the water a short time only—from two to four or five hours. Mrs. Cox was about thirty-seven years of age, stout build, weighing one hundred and eighty-five pounds and upward. The jury were taken to view the place where her body was found. During the course of the trial the record of the coroner's inquest was offered in evidence by the defendant for the purpose of showing that death was the result of suicide, there being a clause in the policy voiding it if death was so occasioned, and, upon objections interposed thereto, it was rejected by the court. The defendant also offered in evidence proofs of Mrs. Cox's death, submitted

by J. H. Bridgeford, scribe of the local lodge, to the Supreme Executive Council, with a copy of the coroner's record attached thereto, whereupon objection was again made to the introduction of such record, but not as to the other proofs, and, defendant's counsel being unwilling to segregate it therefrom, the whole was rejected. At the close of plaintiff's case, and again at the close of the testimony, the defendant moved for a nonsuit, which motion was in each instance denied. Defendant also requested the court to direct the jury to find a verdict for defendant. This was also refused, and, the verdict and judgment being for plaintiff, the defendant appeals.

369 1. The first question of vital importance presented is respecting the admissibility of the record of the coroner's inquisition *super visum corporis* as independent evidence to show the fact of suicide. The contention of counsel is that defendant was entitled to have it go to the jury, not as conclusive evidence of the fact, but along with the other evidence bearing upon the subject, for their consideration. Anciently, the office of coroner was of great dignity, and exercised by persons of high authority, as well as by those in lesser degree and station. Blackstone says: "There are also particular coroners for every county of England, usually four, but sometimes six, and sometimes fewer. This office is of equal antiquity with the sheriff, and was ordained together with him to keep the peace when the earls gave up the wardship of the county. He is still chosen by all the freeholders in the county court": 1 Blackstone's Commentaries, \*347. As ascertained in great measure from the statute (4 Edward I. *de officio coronatoris*), the powers and duties of the coroner are both judicial and ministerial, his judicial authority extending to inquiries touching the manner of death of any person slain, or dying suddenly or in prison, which must be *super visum corporis*; and also to inquiries respecting treasure trove and shipwreck. His ministerial office is only as the sheriff's substitute: 1 Blackstone's Commentaries, \*349; 2 Bacon's Abridgment, 428. A coroner's court in England is a court of record, and upon a finding of *felo de se* the executor or administrator may remove the inquest of office into the court of the king's bench, and traverse it; for it is said: "It would be hard that he should be concluded by an inquisition, which is nothing more than an inquest of office, taken behind his back": Starkie on Evidence, 10th ed., \*404; 7 Am. & Eng. Ency. of Law, 2d ed., 604; 1 Hale's Pleas of the Crown, 416, 417; *Garnett v. Ferrand*, 6 Barn. & C. 611. In the United

States they are generally denominated courts of inferior jurisdiction, and not of record: 7 Am. & Eng. Ency. of Law, 2d ed., 604; but in this state the organic act does not so much as dignify the office with any judicial functions whatever: Const., art. 6, sec. 6; art. <sup>370</sup> 7, secs. 1, 9. In the case of a *felo de se*, under the old law his goods and chattels were forfeited to the king, and his body was given over to an ignominious burial, these resultant features giving the inquisition the semblance of an action in rem, which determined the status both of the person of the deceased and of his goods and chattels. So it has come to be held in England that inquisitions postmortem are admissible as evidence of the status, but not conclusive: *Sergeson v. Sealey*, 2 Atk. 412; *Starkie on Evidence*, 10th ed., \*406; 1 *Greenleaf on Evidence*, 15th ed., sec. 556. A like rule has been promulgated in some of the states of the Union, based upon the reasoning that gave rise to it in the country of its nativity: *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Grand Lodge v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Supreme Lodge v. Fletcher*, 78 Miss. 377, 28 South. 872, 29 South. 523; *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498.

The leading case is perhaps the first cited—*United States Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467—which bases the rule, not upon the ground that the coroner acts in a judicial capacity, for the organic act of the state of Illinois deprived him of any such power, but for the reason that the inquisition is made by a public officer, acting under the sanction of an official oath in the discharge of a public duty enjoined upon him, and returned to and filed in the office of the clerk of the circuit court, as required by law; Mr. Justice Baker, in his concurring opinion, affirming that such an inquisition thereby became a record of the circuit court, and as such is competent as testimony. This authority is apt under our constitution as well, in so far as it discards the idea that a coroner's inquest is judicial in character. Under our statute the coroner has power, when informed that a person has been killed or dangerously wounded by another, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by criminal means, or has committed suicide, to inquire, by the intervention of a jury, into the cause of the death or wound, and to perform the <sup>371</sup> other duties incidental thereto in the manner prescribed by statute: *Bellinger & Cotton's Annotated Codes and Statutes*, sec. 1045. His duty requires



him to go to the place where the dead or wounded person is, and summon six qualified persons to serve as jurors, whose duty it becoemes, on being sworn, to inquire who the person was, and when, where and by what means he came to his death or was wounded, as the case may be, and into the circumstances attending the death or wounding, and give a true verdict therein according to the evidence offered or arising from the inspection of the body. He must subpoena and examine as witnesses every person who, in his opinion, has knowledge of the material facts; also a surgeon or physician, who must inspect the body, and give a professional opinion as to the cause of death or wound; and, for the purpose of compelling such witnesses to attend and testify, or punishing them for disobedience, he is to be deemed a magistrate. The testimony of the witnesses and the verdict must be reduced to writing. If the jury find that a crime has been committed, the coroner must forthwith deliver the testimony and verdict to a magistrate; but, if they do not so find, he must return the same to the clerk of the county court; and, if the verdict also charge a person with the commission of the crime, the magistrate is immediately to issue a warrant for the arrest of such person as on an information, and, when brought before him, to examine into the charge contained in the verdict: Bellinger & Cotton's Annotated Codes and Statutes, sec. 1683-1690. According to this procedure, if the jury do not find that a crime has been committed, the testimony and verdict must be returned to the clerk of the county court, which, under the constitution, is a court of record. This would perhaps include a verdict that death was self-inflicted, so that we have almost a parallel with the Illinois case.

However, it seems to us that that case and those that follow it proceed upon an erroneous principle. Such a document, before it can be admissible under any of the older authorities, must be judicial in character, and we cannot think that the mere fact that it is required to be returned to and filed with the clerk of a court of record endows it with that vitality. Mr. 372 Starkie's classification of judicial documents is: 1. Judgments, decrees, and verdicts; and 2. Inquisitions, depositions, and examinations taken in the course of a judicial proceeding. A third includes writs, warrants, pleadings, etc. Of inquisitions he then says: "Such inquests as are of a public nature, and taken under competent authority, to ascertain a matter of public interest, are, upon principles already announced, admissible in evidence against all the world. They are very analo-

gous to adjudications in rem, being made on behalf of the public. No one is properly a stranger to them, and all who can be affected by them usually have the power of contesting them": Starkie on Evidence, 10th ed., \*316, 403, 404. We have seen that when suicide was involved it was susceptible of traverse under the English system in the court of the king's bench, and had legitimate sanction of a judicial proceeding in every stage of its progress and development; and Greenleaf does not announce a different doctrine. Now, it cannot be said that a coroner's inquest under our system has the sanction or is taken in the course of any judicial proceeding; much less that it is of judicial impress. The verdict of the jury, if no crime is found to have been committed, is merely returned into a court of record, with no power of revision or approval. If a crime has been committed, and a person is charged therewith, the verdict serves as an information, upon which a magistrate may issue a warrant of arrest, and examine him touching the charge; but the inquisition has no probative value in that proceeding even, so that it is wholly extrajudicial, and, within itself, is void of all the essential qualities that go to make it independent evidence of homicide, self-inflicted. This view is supported by abundant authority, and we believe it to be founded upon correct legal principles: *Germania Life Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119, 85 N. W. 459; *State v. Cecil County Commrs.*, 54 Md. 426; *Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. Ap. 611, 43 N. E. 277; *In re Ralston*, 9 Pa. Dist. Rep. 514. The record of the inquest was, therefore properly rejected.

**373** 2. The next question relates to the refusal to admit in evidence the proofs of death as a whole, which is assigned as error. A by-law of the defendant provides that upon the death of the assured the lodge of which he was a member shall at once notify the Supreme Executive Council, giving the name of the deceased member, the number of his certificate, and shall furnish upon blanks provided for that purpose full and satisfactory proofs of death. The blank forms furnished by the supreme lodge require that in case of a voluntary or mysterious death a duly authenticated copy of the coroner's inquest, under his hand, must accompany the proofs. It is undoubtedly a well-established rule of law that the record of a coroner's inquest attached to proofs of death made by the beneficiary or his agent, in conformity to blanks furnished by the company, is admissible in evidence, along with such proofs, upon the ground that it

contains admissions of the beneficiary against his interest as to the cause of death: *Insurance Co. v. Newton*, 22 Wall. 32; *Insurance Co. v. Higginbotham*, 95 U. S. 380; *Keels v. Mutual R. F. Life Assn.*, 29 Fed. 198; *Sharland v. Washington Life Ins. Co.*, 101 Fed. 206, 41 C. C. A. 307; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851; *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417, 4 Pac. 413. But the rule can have no application where such proofs are furnished by the company's agent. When thus furnished, nothing contained therein, unless subscribed by the beneficiary or his agent, or at least with his express or implied sanction, can operate as an admission on his part, and against his interest. Such declarations, from their very nature, must necessarily be self-serving, and could hardly fail to be conducive of abuse or injustice. By section 127 of the by-laws of the order, it is made the duty of the subordinate lodge of which the deceased was a member to notify the Supreme Executive Council of his death in the manner therein designated, and no duty seems to have been cast upon the claimant to furnish proofs of death as a prerequisite to maintain an action upon the certificate. The subordinate lodge is thereby made the agent of the executive council, for whom it acts in furnishing <sup>374</sup> proofs of death, and not for the claimant: *Anderson v. Supreme Council*, 135 N. Y. 107, 31 N. E. 1092; *Supreme Council v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105. The death of Mrs. Cox being admitted, the object of introducing such proofs in behalf of the defendant was solely to show the manner of her death, it having been alleged as a defense that it was the result of her own act. As we have seen, the record of the coroner's inquest is not legitimate evidence for that purpose, and it is not rendered admissible because it is sought to be introduced along with the other proofs of death made up by the agent of the defendant, and could in no way bind the plaintiff as an admission touching the manner of death. The record was therefore, not proper for the consideration of the jury, although it constituted a part of the proofs, there being no controversy as to the fact of death: *Royal Arcanum v. Brashears*, 89 Md. 625, 73 Am. St. Rep. 244, 43 Atl. 866.

3. It is further insisted that a nonsuit should have been granted upon defendant's motion therefor, or that the court should have directed a verdict in favor of the defendant, as requested. As to this we are clearly of the opinion that there was sufficient evidence adduced to justify the court in letting the case go to the jury. The burden of proof was with the defend-

ant to establish suicide, and this it has not done by such clear and convincing evidence, void of dispute and controversy, as to warrant the court in directing a verdict in its favor.

4. There is a presumption that death is the result of natural causes, which inures to the benefit of the plaintiff, and should, as the first step, be satisfactorily overcome before the defendant could have a verdict.

5. Again, the defendant is called upon to counterbalance by such cogent and convincing proofs any testimony adduced tending to establish death from natural causes that there could not reasonably be two opinions touching the result; for, if it were otherwise, it would be an invasion of the province of the jury to take the case from them. The question here, then, is the one stated by the court in the case of *Sovereign Camp v. Haller*, 24 Ind. App. 108, 56 N. E. 255: Are the facts proven <sup>375</sup> such as to exclude any other reasonable inference than that the assured voluntarily took her own life? And this we must answer in the negative. For cases of marked analogy supporting this view, see *Beckett v. Northwestern etc. Assn.*, 67 Minn. 298, 69 N. W. 923; *Royal Arcanum v. Brashears*, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866; *Goldschmidt v. Mutual Life Ins. Co.*, 12 N. Y. Supp. 866, 58 Hun, 611; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Stephenson v. Bankers' Life Assn.*, 108 Iowa, 637, 79 N. W. 459; *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498; *Home Ben. Assn. v. Sargent*, 142 U. S. 691, 12 Sup. Ct. Rep. 332; *Ingersoll v. Knights of Golden Rule*, 47 Fed. 272. It cannot be said that the evidence introduced has but one tendency, and that pointing to self-destruction by the deceased. It is somewhat in conflict, to say the least, and different minds may reasonably come to different conclusions as to whether the act was her own, whether sane or insane, or whether it was the result of apoplexy or sudden sickness, causing her to fall into the water where she was found.

6. The court instructed the jury, among other things, as follows: "One of the defenses in this case is that the deceased, Capitola Blanche Cox, committed suicide, and you are instructed that this is an affirmative defense set up by defendant, and the burden is upon the defendant to establish same to your satisfaction by a preponderance of the testimony. When a person is found dead from unexplainable causes, the presumption is that his death was natural or accidental, if nothing appears to the contrary. Self-destruction is contrary to the general



conduct of mankind. The plaintiff is therefore entitled to recover, unless the evidence introduced has overcome this presumption, and satisfied you that death was voluntary. The presumption of law is, in the absence of any evidence as to the cause of death, that it happened from natural causes, and that such death did not arise from self-destruction; and in this case, if there was no proof as to the cause or manner of death of Mrs. Cox, or if the evidence as to whether her death was caused by accident or natural causes, and not by her own hands, was **376** evenly balanced, you would find in favor of this presumption. But this is only a disputable presumption, and if, from all the evidence in the case, you find by the preponderance thereof that she came to her death by her own hands, whether she was sane or insane, you must find for defendant." Exception was taken to this instruction on account of the use of the words "unexplainable" and "satisfied." It is suggested that Mrs. Cox was not found dead from unexplainable causes; but it is manifest the term was employed by the trial court to define the presumption alluded to, and it was left to the jury to say whether there was any proof as to the cause or manner of her death.

7. It is also suggested that the term "satisfied" is a much stronger one than should have been employed in that relation, signifying, as it does, to settle certainly, or fix permanently, what was before uncertain, doubtful, or disputed. It must be construed, however, in the sense in which it was used. The court explained previously that the burden of proof as to the fact of suicide, if it existed, was with the defendant, and this it must establish to the satisfaction of the jury by a preponderance of the testimony. To be "satisfied" by a preponderance of the evidence and to be "satisfied" in the general sense are entirely different conditions of the mind, and the term was, as clearly indicated by the court, employed in the former sense.

8. But the more serious objection seems to be that the court should not have instructed at all as to the presumption of death from natural causes, affirming that there was sufficient testimony otherwise bearing on the issue from which the jury should have made up their verdict; and citing *Sackberger v. National Grand Lodge*, 73 Mo. App. 38. In the case at bar the evidence is not such as to explain or to indicate with such probability how the body of the deceased came to be in the water as found as to render the presumption unavailable in determining the cause of death. She was found in the water,

but no one saw her go in, and how she came to be there—whether of her own accord or by another cause—no one can positively say from the testimony; hence the presumption becomes <sup>377</sup> a pertinent factor in determining the cause, and, we think, was properly submitted to the jury in aid of their deliberations. The instruction is in accord with rule 120 of Lawson on Presumptive Evidence, 576, and has the support of *Graves v. Colwell*, 90 Ill. 612. These considerations affirm the judgment of the trial court, and such is the order of this court.

### CORONER'S INQUEST AS EVIDENCE.

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#### I. Civil Actions.

##### a. On Insurance Policies.

1. **Inquest Held Admissible.**—The right to introduce the coroner's inquest as evidence in civil suits has arisen most often in that class of cases dealing with insurance policies and beneficiary certificates, one of the terms of which provides against any payment

being made thereunder, in case of the death of the deceased by his own hands.

In this connection there are two views, one holding it admissible, the other inadmissible. The former is supported by the weight of authority: *Grand Lodge v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59, citing 1 *Greenleaf on Evidence*, sec. 556; *Starkie on Evidence*, sec. 404; *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467. In this latter case, which is also cited as *United State Life Ins. Co. v. Kielgast*, the court said: "It will be observed that the evidence of all witnesses examined before the coroner is required to remain in his office, while the inquest must be sealed up and returned to the clerk of the circuit court of the county, where it shall be filed. Thus the inquest becomes, by force of the statute, a record of the circuit court—a public record of the county where the inquest is held. It is a record containing the results of a public inquiry, made by a public officer under authority of law, relating to matters in which the public have an interest. Shall it be held that a public record of this character shall not be evidence, in a judicial proceeding, tending to prove the facts found to be true on the face of such record? We are not prepared to adopt a rule of that kind, moreover, we believe the weight of authority to be in favor of the admission of such evidence." See, also, *Daly v. Dimock*, 55 Conn. 579, 12 Atl. 405.

While admissible, it is, however, not conclusive, being only *prima facie* of the facts found: *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Fein v. Covenant etc. Assn.*, 60 Ill. App. 274; *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498; *Supreme Lodge v. Fletcher*, 78 Miss. 377, 28 South. 872, 29 South. 523; *Sergeson v. Sealey*, 2 Atk. 412. See, also, *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417, 4 Pac. 413; *Ins. Co. v. Newton*, 22 Wall. 32; *Insurance Co. v. Higginbotham*, 95 U. S. 380.

2. **Inquest Held Inadmissible.**—The principal case, *Cox v. Royal Tribe*, 42 Or. 365, 71 Pac. 73, is opposed to this line of decisions, as is also *Germania Life Ins. Co. v. Ross Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488, a strong case. In the course of the opinion, Chief Justice Hoyt said: "It is claimed that inquisitions by coroners were admissible in evidence at common law, and hence are now admissible in jurisdictions where the common-law rule has not been changed by statutes, and the following cases are cited in support of this contention: *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417, 4 Pac. 413.

"The English rule, however, grew out of the fact that the inquisition was a judicial proceeding, authorized by statute, and made the source of title of the king for lands escheating to the govern-

ment; and hence, were analogous to proceedings in rem, but this reason is without force under our system of government. . . . No attempt has since been made to confer judicial power upon coroners in this state; hence, the inquest sought to be introduced in this case was extrajudicially taken, and should have been excluded under the rule laid down by Professor Greenleaf: 1 Greenleaf on Evidence, sec. 556.

"It is true that a contrary conclusion has been reached in the state of Illinois, under statutes quite similar to our own, but those cases were decided since the statutes were adopted here, and for this reason the rule does not prevail, that in adopting a statute of a sister state, we take it with the construction theretofore put upon it by the courts of that state. For this reason the Illinois decisions are persuasive merely, and not controlling." See the distinction made herein between this case and *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417, 4 Pac. 413, and *Insurance Co. v. Newton*, 22 Wall. 32. For other cases in which such evidence has been excluded see *State v. County Commrs.*, 54 Md. 426; *Goldschmidt v. Mutual Life Ins. Co.*, 102 N. Y. 486, 7 N. E. 408, reversing 33 Hun, 441.

**b. Personal Injury Cases.**—The question of the admissibility of this kind of evidence has also arisen in regard to personal injury cases, and it is held that while the cause of death may be shown, negligence may not, as that is extraneous to the province of the inquest: *Chicago etc. Ry. Co. v. Staff*, 46 Ill. App. 499; *Lake Shore etc. Ry. Co. v. Taylor*, 46 Ill. App. 506; *Cox v. Chicago etc. Ry. Co.*, 92 Ill. App. 15. In the former of these cases the reason therefor is thus expressed: "To permit the conclusions of a coroner's jury, imputing negligence and casting the blame for the death of an individual upon a party who was in nowise, save as one of the human beings of the world, a party to its proceedings, and had neither voice in the selection of the triers nor opportunity to place before them aught that might tend to show his own innocence, is to condemn one unheard, and to violate the most fundamental of all principles applicable to proceedings in courts of justice."

Depositions taken upon the inquest are not admissible, however: *Pittsburg etc. Ry. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439; *Lake Shore etc. Ry. Co. v. Taylor*, 46 Ill. App. 506.

**c. Irregular Verdict.**—The report of a coroner not based on the verdict of a jury regularly impaneled is not admissible in evidence: *National Union v. Thomas*, 10 App. D. C. 277. So a paper purporting to be a finding that the insured committed suicide, signed by the coroner of St. Louis, but lacking the essentials of an inquisition under the statutes of Illinois or at common law, as where no jury was impaneled, cannot be introduced in an Illinois court, when



the statutes of Missouri are not offered to show its competency: *National Gross Loge etc. v. Jung*, 65 Ill. App. 313.

## II. Cases of Homicide.

**a. The Verdict.**—While a prisoner cannot be tried upon a coroner's inquisition, finding him guilty of murder, which can be done only by following the method prescribed by law, as on presentment by the grand jury: *State v. Powell*, 7 N. J. L. 244; it becomes necessary to determine the admissibility and force of the verdict and proceedings of the inquest as evidence, and also the statements and testimony there given, when attempted to be used on a trial of the case.

**1. Reasons for Inadmissibility.**—The only object and result of a coroner's proceedings is to furnish prompt information which may guide the officers of the law in apprehending and prosecuting those who appear to have been connected with a supposed homicide, and by discovering the evidence by which it may be investigated; and, strictly speaking, has no legal effect: *Ralston's Petition*, 9 Pa. Dist. Rep. 514, 30 Pittsb. Leg. J., N. S., 410. The verdict and proceedings are therefore inadmissible in evidence; *Smalls v. State*, 101 Ga. 570, 28 S. E. 981; *Colquit v. State*, 107 Tenn. 381, 64 S. W. 713; *Whitehurst v. Commonwealth*, 79 Va. 556, in which case the court said: "To admit those proceedings, and a verdict thus arrived at, to be used as evidence upon the trial, to influence, perhaps to control, the verdict of the jury, would, in our judgment, lead to the subversion and final overthrow of the jury system; whilst in nearly every case the rights of either the commonwealth or the accused would be inevitably prejudiced."

**2. Binding on Accused.**—This rule is binding also upon the accused; so he cannot introduce the verdict of the coroner's jury to show that they found he acted in self-defense: *State v. Row*, 81 Iowa, 138, 46 N. W. 872.

**b. Minutes of the Proceedings.**—In *Lovett v. State*, 60 Ga. 257, it was held that minutes of the evidence officially made at a coroner's inquest, part of which was given by the prisoner himself, and the rest by another witness, the prisoner testifying that it also was true, are admissible in evidence. But such minutes were held not admissible in *Bass v. State*, 29 Ark. 142; *State v. Row*, 81 Iowa, 138, 46 N. W. 872.

So the minutes of a shorthand stenographer, taken on preliminary examination or at an inquest, afterward written out by him, but not made under the direction of the magistrate nor signed by the witnesses, are not admissible as records, but merely as memoranda for the purpose of refreshing the memory of the stenographer: *Rounds v. State*, 57 Wis. 45, 14 N. W. 865. See, also, *McLain v.*

Commonwealth, 99 Pa. St. 86; *State v. M'Elmurray*, 3 Strob. (S. C.) 33, in both of which cases memoranda of the testimony of witnesses were excluded.

Where the minutes of the testimony are filed, and the same are not required by law, a person indicted for the killing of the deceased is not allowed to put in evidence the fact that the testimony was so filed, and that the government afterward suppressed it: *Commonwealth v. Ryan*, 134 Mass. 223.

A copy of the certificate of death purported to have been made by the coroner is also inadmissible: *State v. Garth*, 164 Mo. 553, 65 S. W. 275.

**c. Proces Verbal.**—In Louisiana, the species of inquest known as proces verbal is held admissible to show death, and the cause thereof, but the recital of facts contained therein, being hearsay, is excluded: *State v. Duffy*, 39 La. Ann. 419, 2 South. 184; *State v. Tate*, 50 La. Ann. 1183, 24 South. 592; *State v. Baptiste*, 108 La. 234, 32 South. 371. The fact that a statute authorizes its use before the grand jury does not exclude it from being used before a trial jury: *State v. Parker*, 7 La. Ann. 83; *State v. Duffy*, 39 La. Ann. 419, 2 South. 184.

#### **d. Evidence Given at the Inquest.**

##### **1. When Given by the Defendant.**

**A. As Witness.**—We now come to a consideration of the admissibility of evidence given before the coroner at the inquest. First, as to the statements and testimony of the defendant himself. In such a case the courts make a distinction between where the defendant is not charged with, or suspected of the commission of the homicide, and where he is so charged or suspected.

In the first instance, he is merely a witness, and has none of the rights or immunities of a party: *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 10 N. Y. Ann. Cas. 256, where the court, after speaking of this, proceeded: "This is the foundation of the rule which is now firmly established in this state—that when a person testifies at an inquest as an accused or arrested party, his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been voluntarily given after he has been fully advised of all his rights and has been given an opportunity to avail himself of them: *People v. Chapleau*, 121 N. Y. 267, 24 N. E. 469. The logical and necessary corollary of that part of the rule stated is that when a person testifies simply as a witness and not as a party, his testimony can be used against him even though he is afterward indicted and tried for the commission of the crime disclosed by the inquest: *Hendrickson v. People*, 10 N. Y. 14, 61 Am. Dec. 721; *Teachout v. People*,

41 N. Y. 7." To the same effect are *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *State v. Vaigneur*, 5 Rich. (S. C.) 391. But see *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380. See, also, *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496, reversing, 38 Hun, 188.

**B. As Accused.**—In *Teachout v. People*, 41 N. Y. 7, the cases of *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, *People v. Hendrickson*, 10 How. Pr. 155, and *People v. McMahon*, 15 N. Y. 384, are thus distinguished: "In the first case the prisoner had been examined as a witness before the coroner, who was conducting an inquiry into the cause of death, but without any charge having been made against the prisoner, and when he had not been apprised that suspicion rested upon him, except so far as the interrogatories addressed to him were calculated to suggest that the death was caused by his agency. In the latter case the prisoner was in actual custody, as a suspected party (without warrant), and was examined by the coroner while in such custody on oath.

"In the former case the declarations were held admissible; in the latter they were held incompetent. The precise distinction by which the latter is distinguished is that in the latter case the prisoner stood before the coroner as a party, in fact charged with the crime, and was there subjected to examination on oath touching his own guilt or innocence. The coroner was in such case substantially in the place of an examining magistrate; and the fact that the prisoner was held under an arrest made without warrant could not make his protection against such an inquisition less imperative." In that case—*Teachout v. People*, 41 N. Y. 7—statements made by the prisoner were held admissible, although he knew it was suspected that the deceased was poisoned, and that he himself would probably be arrested for the crime, he being informed by the coroner that rumors implicated him and that he need not testify. In *Wood v. State*, 22 Tex. App. 431, 3 S. W. 336, the court held that if, when a party is examined as a witness before the coroner, he is charged or suspected of the crime, of which fact he is aware, his testimony cannot be used against him on the trial.

Where the district attorney, in his summing up to the coroner's jury, stated that he has suspected a witness of the crime all along, but had pretended to suspect another, so as to lull the former into a sense of security and get him to testify, the status of such witness is not changed so as to make him a party to the inquest, and so render his testimony inadmissible against him upon a trial for the murder: *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 10 N. Y. Ann. Cas. 256.

The rule that if the defendant, when testifying before the coroner, is under arrest, his testimony is inadmissible, applies only where he is sworn and examined, not on his own motion, but on the motion of the prosecution: *Lyons v. People*, 137 Ill. 602, 27 N. E. 677.

## 2. Voluntary Statements.

**A. What so Considered.**—Statements, then, voluntarily made by the defendant at the inquest, are admissible against him at the trial: *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972, citing *Snyder v. State*, 59 Ind. 105; *Brown v. State*, 71 Ind. 470; *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *Sage v. State*, 127 Ind. 15, 27 N. E. 667; *State v. Young*, 119 Mo. 495, 24 S. W. 1038. It, therefore, becomes of the highest importance to determine what confessions, in such cases, are deemed voluntary.

In *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, *People v. Hendrickson*, 9 How. Pr. 155, it is stated as the well-settled rule of law that where a witness answers questions tending to criminate him, to which he might have demurred, such answers are deemed voluntary, because he has a right to refuse to answer such questions. But if he should be compelled to answer, after claiming his privilege, it will be deemed compulsory, and not admissible against him. So, if he is told he need not make a statement tending to criminate himself, and he nevertheless does testify, it may be introduced in evidence: *State v. South*, 5 Ohio Cir. Ct. Rep. 94, 3 Ohio C. D. 48. And where he requests the privilege of making a statement, in order to cast the crime upon another, it is, of course, voluntary: *State v. Wisdom*, 119 Mo. 539, 24 S. W. 1047.

In *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496, reversing 38 Hun, 188, the prisoner was an ignorant Italian laborer, unfamiliar with the English language, and, after being arrested, was examined at the inquest by the district attorney and coroner, under oath. He was unattended by counsel, did not appear to have been informed of his rights, or that he was not bound to answer questions tending to criminate him; and it was held that to allow the evidence thus obtained at the inquest to go in was reversible error, the court saying: "The evidence sought to be exclude is not a confession, certainly not a voluntary confession, but an official examination on oath of the prisoner while in custody." And so where the defendant was an ignorant German boy, who was without counsel and was not advised of his right to decline to testify, it was held that his testimony given at the inquest could not be used against him, as to allow it would be infringing the constitutional right that no person should be compelled to testify against himself on a criminal charge: *State v. Young*, 119 Mo. 495, 24 S. W. 1038. See, also, *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.

**B. Effect of Oath.**—Some question has arisen as to whether or not the fact that the prisoner testified under oath makes the confession involuntary. The better rule is that it does not. This  
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whole subject is historically treated in *State v. Gilman*, 51 Me. 206, and many English and American authorities set forth. After summing them up the court said: "The true test of admissibility in this class of cases is, was the statement offered in evidence made voluntarily, without compulsion? If this proposition be answered in the affirmative, then the statement is clearly admissible in principle; but if not voluntary, if obtained by any degree of coercion, then it must be rejected, as well by the rules of the common law as by positive constitutional provision.

"Does it follow that because a statement is made upon oath, in a proceeding where the circumstances of the commission of the crime are being investigated, and the person making such statements is a suspected or accused person, that it must necessarily be involuntarily made? May not a man depose on oath as freely as he may speak when unsworn? And if so, do his statements become any less reliable than when made without the sanction of an oath?

"But the argument is, that, as a witness, he is sworn to state 'the truth, the whole truth, and nothing but the truth.' And that the impressiveness of obligation, and the solemnity of the occasion, would have a tendency to wring from the party thus situated facts and circumstances which he is not bound to disclose, and therefore can in no just sense be said to be voluntary. As a general proposition, this may be true, especially if the party is uninformed with regard to his rights. But when he is fully apprised of his rights, and informed that he is under no legal obligation to disclose any facts prejudicial to himself, or to give evidence against himself, and then deliberately makes statements under oath, no good reason is perceived why such statements should not be given in evidence against him. He may testify as freely as he may speak." See to the same effect, *Wilson v. State*, 110 Ala. 1, 55 Am. St. Rep. 17, 20 South. 415; *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724; *State v. Young*, 119 Mo. 495, 24 S. W. 1038. But the rule is otherwise where the oath is administered by a tribunal having no legal authority to administer it: *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724, quoting 1 Bishop's Criminal Procedure, secs. 1255-1257.

**C. Presumption and Proof.**—Testimony given by the defendant at a coroner's inquest will, in the absence of contrary evidence, be presumed to have been given voluntarily: *State v. Mullins*, 101 Mo. 514, 14 S. W. 625; *State v. David*, 131 Mo. 380, 33 S. W. 28.

A coroner's stenographer, who reported the inquest, may, for the purpose of showing that the defendant testified voluntarily thereat, testify as to the uniform method pursued in the coroner's office when a prisoner makes a statement, that he is told he need not do so unless he wishes, and need not be sworn, although he

does not remember that such method was used in the case of the defendant: *State v. Taylor*, 126 Mo. 531, 29 S. W. 598.

**D. Introduction of Part Thereof.**—On a trial for murder the state may introduce part of the defendant's testimony, given at the coroner's inquest, without introducing the whole thereof, the defendant being entitled to introduce the remainder: *Rounds v. State*, 57 Wis. 45, 14 N. W. 865; *Emery v. State*, 92 Wis. 146, 65 N. W. 848.

**E. Presumed Favorable to Defendant.**—The statement made by the accused at the inquest, when considered by the jury upon the trial, are to be presumed to have been made as favorable to himself as truth would permit: *People v. Walworth*, 4 N. Y. Cr. Rep. 355.

### 3. Where Given by Witnesses.

**A. When Admissible.**—The general rule is that the testimony of witnesses, other than the accused, given before a coroner's jury, is admissible on a trial for homicide growing out of the inquest, but it must appear that the witness is dead in order to make use of such statement. It is not sufficient to show that the sheriff has made a return that the witness could not be found: *State v. Grady*, 83 N. C. 643; nor that he has removed from the state: *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 442; and this applies as well to the defense as to the prosecution: *Sylvester v. State*, 71 Ala. 17.

In *State v. Campbell*, 1 Rich. (S. C.) 124, the testimony of a witness, examined on the coroner's inquest, in the absence of the prisoner, though taken down in writing by the coroner, signed by the witness, and returned to the clerk, was held not competent evidence against the defendant, after the death of the witness, as that would be taking away the right of cross-examination. But this does not apply where the defendant offers such evidence. "The constitutional provision mentioned was intended and designed to afford a protection to the accused—to guarantee him against the testimony of witnesses whom he had no opportunity to cross-examine, and whom, perhaps, he had never seen. It is a privilege granted him, but a privilege in his favor which he may waive": *State v. McNeil*, 33 La. Ann. 1332. By statute, in Texas, where the defendant is present when the testimony is taken, and has the privilege of cross-examining the witnesses, the deposition taken before an examining court or inquest, reduced to writing, and certified according to law, is admissible: *Ex parte Meyers*, 33 Tex. Cr. Rep. 204, 26 S. W. 196.

A witness may be asked on cross-examination as to his statements at the coroner's inquest, he not being tried or then accused: *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, distinguishing *State v. Senn*, 32 S. C. 392, 11 S. E. 292. The testimony of a witness

given at an inquest is not admissible by the defense in a murder trial, no foundation therefor having been laid, and the witness being allowed to answer whether he testified to a certain thing at the inquest, which answer was not denied by the prosecution, who introduced no testimony given before the coroner: *Halloway v. People*, 181 Ill. 544, 54 N. E. 1030. So evidence as to what was said and done at the inquest, regarding the ownership and caliber of two pistols, one of which was said to have been the defendant's, is incompetent; and if relevant, should be proved without reference to the evidence given before the coroner: *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357. For questions as to evidence given at the inquest and held improper, see *Hall v. State* (Ala.), 34 South. 680.

Evidence given by state's witness at the inquest is inadmissible where no predicate has been laid: *Head v. State*, 40 Tex. Cr. Rep. 265, 50 S. W. 352. See *Johnson v. State*, 26 Tex. App. 631, 10 S. W. 235, for facts held sufficient to establish a predicate, the witness being a nonresident and not present at the trial.

A physician who assisted the coroner to make a postmortem examination may testify as to the result of the autopsy, although the law requires the coroner to make a record of his inquest: *State v. Vaughan*, 152 Mo. 73, 53 S. W. 420.

**B. Weight of Such Evidence.**—On a trial for manslaughter, witnesses for the defense testified on cross-examination as to what they had sworn to before the coroner. The defendant asked the court to instruct the jury "that what any witness or witnesses may have testified to before the grand jury or at the coroner's inquisition is no evidence of the guilt of the defendant." This the court refused to give and such refusal was held error, as the answers of the witnesses could only be considered by the jury in weighing their testimony, as to the facts sworn to before them, and not as establishing independent facts testified to on a former occasion: *Ritter v. People*, 130 Ill. 255, 22 N. E. 605.

In a prosecution for murder, the fact that several months elapsed between the commission of the crime and the examination of the body does not affect the competency of the testimony, but only its weight: *Hayes v. State*, 112 Wis. 304, 87 N. W. 1076.

#### 4. Use for Impeachment.

**A. Depositions and Statements.**—Depositions or statements of witnesses made before a coroner's jury may be used on the trial of the case to contradict or impeach such witnesses: *People v. Devine*, 44 Cal. 452; *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034; and this may be done by showing the witness gave a different account before the coroner, even though the examination before such officer is not made evidence by statute: *People v. White*, 24 Wend.

(N. Y.) 520, affirming 22 Wend. 167. Such statements, however, may be read for the purpose of discrediting the witness so far only as his attention has been called thereto, and an opportunity of explaining the discrepancies presented to him: *Stephens v. People*, 19 N. Y. 549; and in Montana, by statute, the written evidence must be shown to the witness before putting the questions: *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.

**B. Parol.**—Where the testimony before the coroner's inquest must be taken down in writing, the law conclusively presumes that it was done, and unless proper foundation be laid for secondary evidence, parol evidence of testimony given before the coroner by such witness is inadmissible, even to impeach him at the trial: *Woods v. State*, 63 Ind. 353. So where it is allowable to prove contradictory statements by introducing his written testimony at the inquest, it is not permissible to prove by parol other contradictory statements made by the witness at the same time, but not contained in the written testimony: *Moffatt v. State*, 35 Tex. Cr. Rep. 257, 33 S. W. 344.

**C. Defendant may be Impeached.**—Statements made by the defendant may also be made use of to contradict him on the trial for the homicide: *Woods v. State*, 63 Ind. 353; *State v. Wisdom*, 119 Mo. 539, 24 S. W. 1047. While admissible for this purpose, it cannot be introduced for the purpose of corroborating the statement of the accused at the trial: *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72.

#### e. Parol Evidence.

**1. General Rule.**—The deposition of a witness at a coroner's inquest, as taken down by the coroner, is the best evidence of what such witness then swore: *State v. Prater*, 26 S. C. 198, 613, 2 S. E. 108; and parol evidence of what was sworn before such inquest and reduced to writing by the coroner, cannot be received: *State v. Zellers*, 7 N. J. L. 220.

**2. Regularity of Proceedings.**—Where the proceedings before the coroner are regular, the record of the testimony taken before him is, of course, the best evidence of what such testimony was, and parol evidence of anything not therein contained is excluded: *Robinson v. State*, 87 Ind. 292. Where, however, the proceedings before the coroner are so irregular that the written examination is not admissible in evidence, it is competent to prove by parol what was testified to before him: *Brown v. State*, 71 Ind. 470.

**3. Where Testimony not Reduced to Writing.**—Parol evidence is admissible to prove what a witness testified to at the inquest, if the testimony was not reduced to writing, that being the best evidence producible: *Nelson v. State*, 32 Ark. 192; and this same



rule applies to statements voluntarily made by the accused before the coroner's jury: *Lyons v. People*, 137 Ill. 602, 27 N. E. 677, citing 1 Greenleaf on Evidence, sec. 227; *State v. Parish*, 35 N. C. (Busb.) 239; *Rex v. Reed*, 1 Moody & M. 403; *King v. Fearshire*, 1 Leach, 240.

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### ABERNETHY v. ORTON.

[42 Or. 437, 71 Pac. 327.]

**EQUITY**—Resort to Where There is a Remedy at Law.—A suit in equity cannot be maintained where there is a plain, speedy, and adequate remedy at law, though the same judge presides over the courts of law and of equity. (p. 776.)

**A LIFE TENANT Must Keep the Current Taxes Paid** if the estate is sufficient for that purpose. (p. 776.)

**LIFE TENANT, Remedy Against.**—Where a life tenant fails to pay the taxes, and another party is compelled to pay them to protect his interest, he has a remedy over against such tenant for the recovery of the amount paid. (p. 777.)

**WASTE.**—The Failure of a Life Tenant to Pay Taxes whereby the interest of a remainderman is in danger of being forfeited constitutes waste. (p. 779.)

**LIFE TENANT Failing to Pay Taxes—Equity Jurisdiction.**—If a life tenant refuses to pay the current taxes, although the rent received by him is sufficient for that purpose, such refusal constitutes waste jeopardizing and tending to the destruction of the estate, and equity has jurisdiction for that reason over the subject matter, and may entertain a suit to compel such tenant to reimburse the remainderman for expenditures made in paying such taxes. (p. 779.)

John C. Spencer and George G. Pingham, for the appellant.

James McCain and McCain & Vinton, for the respondents.

**438 MOORE, C. J.** This is a suit by C. H. Abernethy and others against Iri Orton to impress a lien upon an interest in real property. The transcript shows that on January 24, 1891, the defendant, Iri Orton, for the expressed consideration of five hundred dollars, executed to his daughter, Elizabeth A. Abernethy, a deed conveying the south half of the donation land claim of John J. and Elmira J. Davis, in Yamhill county, Oregon—reserving to himself, however, a life estate therein—of which premises he has at all times since said date had the exclusive possession. Mrs. Abernethy, on December 31, 1892, conveyed her interest in said land to the plaintiffs, her sons, C. H. and Guy V. Abernethy, and her daughter, Mattie E. El-

dridge. The defendant having refused to pay any part of the state, county, school, or road taxes levied upon said real property, the sums so levied were paid the respective years succeeding the levy thereof as follows: By Mrs. Abernethy, July 1, 1892, thirty-six dollars and thirty-eight cents; and by the plaintiffs, July 1, 1893, sixty-two dollars and forty-five cents; April 3, 1894, thirty-one dollars and thirty-five cents; July 1, 1895, thirty-two dollars and five cents—the taxes of the latter year, thirty-eight dollars and fifty-five cents, remaining delinquent October 7, 1896, when this suit was instituted. The complaint, having set out the facts hereinbefore stated, further alleges, in substance, that, to prevent a sale of the property, Mrs. Abernethy and the plaintiffs were compelled to pay said taxes, and that prior to the commencement of this suit, she assigned to plaintiffs all her interest in the sum paid by her; that plaintiffs made demand of defendant for the several sums so paid, but he refused to <sup>439</sup> comply therewith, declaring that he intended to let the premises be sold for the delinquent taxes, and purchase the same for his own use, so as to defeat their interest therein; that the premises consist of a productive farm worth about five thousand dollars, the annual rental value of which greatly exceeds the taxes yearly imposed thereon; and that plaintiffs have no plain, adequate, or complete remedy at law for the redress of their said grievances. The prayer is for the recovery of the sums so paid, with interest at the rate of eight per cent per annum from the several dates of payment; that the amount thereof may be decreed to be a lien on the defendant's interest in said land, and that said interest may be sold to satisfy the same; that a receiver be appointed to take charge of and rent the property, pay the taxes that may be hereafter imposed thereon, keep the premises in repair, and retain the costs and expenses incurred by him, paying the remainder to the defendant; and for such other and further relief as to the court may seem just and equitable. A demurrer, interposed on the grounds that the court did not have jurisdiction of the subject matter, and that the complaint did not state facts sufficient to constitute a cause of suit, having been overruled, an answer was filed, denying the material allegations of the complaint and averring that defendant, in consideration of five hundred dollars and the payment of all taxes that might thereafter be imposed, executed said deed to his daughter, with the mutual understanding that he was to occupy the premises during his natural life, free from the payment of any impositions thereon,

and that she and her successors in interest would pay all such taxes, and that at the time she conveyed her interest in the property to plaintiffs they had knowledge of such agreement, acquiesced therein and agreed thereto. The reply, having denied the material allegations of new matter in the answer, a trial was had, resulting in a decree as prayed for in the complaint, and defendant appeals.

**441** 1. It is contended by defendant's counsel that plaintiffs had a plain, speedy, and adequate remedy at law for the recovery of the taxes paid by them, and, this being so, a court of equity had no jurisdiction of the subject matter, and that the demurrer interposed on that ground should be sustained. In this state, though the same judge presides over courts of law and of equity, they are separate tribunals; and the rule is settled by repeated adjudications that when the right involved is of such a character that a court of law is authorized to take cognizance of it and to afford a plain, adequate, and complete remedy, the general principle is that the plaintiff must enforce such right at law: *Bellinger & Cotton's Annotated Codes and Statutes*, sec. 390; *Phipps v. Kelly*, 12 Or. 213, 6 Pac. 707; *Ming Yue v. Coos Bay R. Co.*, 24 Or. 392, 33 Pac. 641; *Willis v. Crawford*, 38 Or. 522, 63 Pac. 985, 64 Pac. 866.

2. It is the duty of the tenant for life to keep the current taxes paid, if the estate is sufficient for that purpose (25 Am. & **442** Eng. Ency. of Law, 1st ed., 281), and when any other party, on his default is compelled to pay such taxes to protect his own interests, he has a remedy over for the recovery of the amount so paid: *Cairns v. Chabert*, 3 Edw. Ch. 312; *Deraismes v. Deraismes*, 72 N. Y. 154; *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163. "Where the plaintiff," says Mr. Chitty in his work on Contracts, volume 2, eleventh American edition, 883, "is compelled to pay the defendant's debt, in consequence of his neglect or omission so to do, the law infers that the defendant requested the plaintiff to make the payment for him, and gives him the action for money paid." In *Norton v. Colgrove*, 41 Mich. 544, 3 N. W. 159, it was held that payment by a grantee, for his own protection, of encumbrances which the grantor had bound himself to pay, was compulsory, and would support an action for money paid to the grantor's use on an implied promise to repay it. Mr. Justice Cooley, speaking for the court, in deciding the case, says: "If the defendant was charged with the duty to make payment, but neglected to do so, and plaintiff was compelled to pay for the protection of his own interest, the law will imply a promise to repay."

3. If neither Mrs. Abernethy nor the plaintiffs agreed to pay the taxes, the duty of discharging them would necessarily devolve upon the defendant, it being admitted that the annual rent of the premises exceeded the yearly taxes; but if he made default therein, and the plaintiffs were compelled to pay them in order to protect their interests in the premises, they could recover the sums so paid in an action at law based upon the defendant's request, which the law would imply; and, if the recovery of the taxes so paid is the only right involved, it is quite probable that plaintiffs had a plain, adequate, and complete remedy at law. In *Wade v. Malloy*, 16 Hun, 226, it was held that where a tenant for life of certain land willfully neglects to pay the interest accruing upon a mortgage thereon, to the end that the same may be foreclosed and the land sold, and such sale is accordingly had, an action lies against the tenant for life by the remainderman to recover the damages he has sustained by reason of such neglect. Mr. Justice Dykman, in rendering <sup>443</sup> the decision, says: "It is a general rule, applicable to this case, that, where there is an encumbrance upon the whole land, and there is an estate in the land for life, and a remainder in fee, the life tenant is bound to pay the interest on the encumbrance during the continuance of his estate: 4 Kent's Commentaries, 74. In this case there were no equities between the parties preventing the application of this general rule of law, and it was a duty the defendant owed to the plaintiff to keep down the interest on the mortgage, as he was under obligations to her to commit and permit no waste upon the premises. These duties were imposed upon him by operation of law, in the relation he sustained toward the plaintiff. He was bound to see to it that he was not guilty of waste, either voluntary or permissive, and he was also bound to take proper care to prevent deterioration and decay: Gerard on Titles, 154, and cases cited. If he was guilty of any of these forbidden acts, he rendered himself liable to respond in damages. Waste is the deherison of the remainderman or reversioner: *Livingston v. Reynolds*, 26 Wend. 122. 'Deherison' is defined to be disinheriting, a depriving or putting out of an inheritance (*Burrill's Law Dictionary*); and the old writ of waste called upon the tenant to appear and show cause why he had committed waste and destruction in the place named, to the deherison of the plaintiff: 3 Blackstone's Commentaries, 228. It thus appears that any act or omission of the tenant which deprives the person in remainder or reversion of the inheritance is waste." In *Clark v. Middlesworth*, 82



Ind. 240, the court, commenting upon the principle thus announced, said: "If, through the failure of the tenant to pay the taxes, if the income of the estate is sufficient to discharge them, the estate is sold and conveyed to another, beyond the power of the remainderman to recover it, it is, as to him, destroyed, wasted and the inheritance gone; and the tenant should pay for the lot."

In *Phelan v. Boylan*, 25 Wis. 679, it was held that a tenant for life who neglects to pay taxes after his tenancy commences is liable to an action for waste, Mr. Chief Justice Dixon saying: "And in this case the plaintiffs might have sued under the statute, and obtained judgment for double the amount of <sup>444</sup> damages found by the jury: Rev. Stats., c. 143, secs. 1-6. But in *Cairns v. Chabert*, 3 Edw. Ch. 312, a bill in equity was sustained against the tenant for life to restrain the disposition of property and to compel the tenant to keep down assessments and taxes; and upon motion an order was entered for the appointment of a receiver of so much of the rents and income of the estate as should be necessary to pay off the taxes in arrear, unless within forty days from service of a copy of the order the tenant should show to the satisfaction of the master that the taxes had been paid. It would seem from this that the nonpayment of taxes by the tenant constitutes substantive ground for relief in equity, notwithstanding the remedy at law to recover damages for waste. And there may be good reason for this. The remedy at law may be, and no doubt is, inadequate. The tenant may be insolvent or other circumstances exist rendering the judgment for damages of no value." In *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193, 20 Atl. 213, it was held that if a tenant for life refuses to keep down the taxes or to make repairs which he is legally bound to do, a receiver would be appointed to collect the rents sufficient in amount to discharge the liabilities of the tenant's estate for which they are answerable. In *St. Paul Trust Co. v. Mintzer*, 65 Minn. 121, 60 Am. St. Rep. 441, 67 N. W. 657, a life tenant in a homestead estate having neglected and refused to pay taxes or make repairs thereon for many years, in order to save the estate from entire loss to the reversioners the taxes were paid by the administrator with the will annexed, having power so to do by the express terms of the will; and it was held by the supreme court of Minnesota that such administrator might proceed in equity to have a receiver appointed to take charge of the premises, collect the income or rentals of

the property, and apply the proceeds to the payment of the taxes and necessary expense of repairs, and reimburse the administrator for such taxes and expenses so paid, and also pay from such income any unpaid taxes or expense for repairs necessarily made to save the property, and that, if such rental is insufficient the receiver may, under authority and direction <sup>445</sup> of the trial court, proceed to sell the life estate of the defendant in the premises, or so much thereof as may be sufficient for such purpose.

The cases to which attention has been called proceed upon the theory that the neglect or refusal of the tenant for life to pay the current taxes, whereby the interest of the remainderman in the premises is in danger of being forfeited, constitutes waste (28 Am. & Eng. Ency. of Law, 1st ed., 890), going to the destruction of the estate, to prevent which equity will intervene, and by the appointment of a receiver subject the rents and profits to the payment of the delinquent taxes. The defendant having refused to pay the current taxes, although the rent received by him was sufficient for that purpose, the plaintiffs were compelled to discharge them to protect their interests in the premises; and as such refusal constituted waste, jeopardizing the estate, and tended to its destruction, equity for that reason had jurisdiction of the subject matter, and no error was committed in overruling the demurrer.

4. We think it useless to quote from or comment upon the testimony relating to Mrs. Abernethy's alleged agreement to pay the taxes, the burden of proving which was imposed upon the defendant under the allegations of his answer. The deed executed by him to his daughter did not contain any stipulation in respect to the payment of taxes, which leads us to believe that no contract to that effect had been consummated; otherwise it would have been incorporated in the conveyance. But, however this may be, a careful examination of the testimony leads us to conclude that the court reached a proper conclusion upon this question.

Other errors are assigned, but, deeming them unimportant, the decree is affirmed.

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*A Life Tenant* of real property owes both the estate and the remainderman the duty of paying the taxes thereon: *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505; *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 60 Am. St. Rep. 444, 67 N. W. 657.

*Taxes Necessarily Paid* by a mortgagee, when the mortgagor neglects to keep them down, may be added to the mortgage debt: *Lidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163; *Abbott v. Stone*, 172 Ill. 634, 64 Am. St. Rep. 60, 50 N. E. 328; note to *Caldwell v. Hall*, 4 Am. St. Rep. 70, 71.

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## LA FOLLETT v. MITCHELL.

[42 Or. 465, 69 Pac. 916.]

**PLEADING—Party Cannot Take Position Inconsistent With.** Where a defendant in his answer alleges that a writ was placed in the hands of one T. as constable, and that he, as such, under defendant's direction, levied on certain property, such defendant cannot claim that it has not been shown that T. was an officer authorized to levy such writ. (p. 784.)

**ATTACHMENT—Officer—Capacity, When Need not be Proved.** Where, for the purpose of excusing a failure to deliver property, defendant pleads that the other party to the action prevented the delivery by causing the property to be attached by one T., a constable, it is not necessary to prove either that he was such constable or that he had authority to levy the writ. (p. 784.)

**OFFICER'S RETURN, When not Conclusive.**—Where the allegation of the plaintiff that certain property was attached is made only for the purpose of excusing his failure to deliver it, he is not bound by the officer's return on the writ as to the amount of property levied upon, but may show by other evidence that the entire property was seized by the officer and placed in the possession of a keeper, though such evidence was inconsistent with the return on the writ. (pp. 784, 785.)

**RES JUDICATA.**—Where the Second Action Between the Same Parties is upon a Different Demand or Claim, the judgment in the prior action operates as a bar or estoppel only as to those matters directly in issue, and not as to those collaterally litigated. (p. 786.)

**RES JUDICATA—Damages not Ascertained.**—One who is sued for the breach of a contract is not compelled to assert a breach of such contract by his adversary, and to claim damages therefor, but may, on defeating the action, subsequently bring suit against the plaintiff in the former action to recover for a breach of the contract by the latter, occurring before the commencement of the first action. (p. 786.)

**RES JUDICATA.**—Because in a Prior Action a Different Question from that Actually Determined Might have Arisen and Been Litigated, it cannot be claimed that such possible question is excluded from consideration in a second action between the same parties on a different demand. (pp. 786, 787.)

**RES JUDICATA—Inconsistency Between the Positions of a Party in Different Suits.**—That the position assumed by the plaintiff in a prior suit between him and the defendant is inconsistent with his position in the present action is not fatal to him, if the matter

litigated in the first suit was different from that presented in the second, and the defendant in the second suit has not been misled or injured by an inconsistent position of his adversary. (p. 787.)

Carson & Adams and Edward Mendenhall, for the appellant.

John Bayne and John A. Jeffrey, for the respondent.

**466** BEAN, J. This is an action by Joseph W. La Follett against McKinley Mitchell to recover damages for breach of a contract. On May 17, 1898, the plaintiff and defendant entered into a contract, whereby the former agreed to sell and deliver to the latter by June 1, 1898, if possible, f. o. b. boat on the Willamette river, all his crop of potatoes, which it was supposed would amount to from seven hundred to nine hundred sacks, defendant to furnish the sacks and pay a certain stipulated price for the potatoes when so delivered. Soon after making the contract, the plaintiff, with five employés, entered upon its performance, sacking and putting the potatoes in condition for delivery. On May 27th, the defendant proposed a modification of the contract, so that the delivery should be made at the plaintiff's farm, instead of on board the boat, to which plaintiff offered to consent, providing defendant would pay the balance due before the potatoes were removed. Defendant refused to make such payment and notified the plaintiff that he would not accept the potatoes at any time or place, at the same time demanding the return of the twenty dollars paid on the purchase price and the value of the sacks he had furnished. Plaintiff refused to return the money so advanced on the contract or to pay for the sacks, but informed the defendant that he intended to comply with his contract by delivering the potatoes at the time and place agreed on. On the next day the defendant commenced an action in a justice's **467** court against the plaintiff to recover the money advanced under the contract, the value of the sacks he had furnished the plaintiff, and some other items as damages, alleging that the plaintiff had violated the terms of his contract, and had refused to comply therewith. At the same time he sued out a writ of attachment, and on the 31st of May, in company with the acting constable, went to the farm of the plaintiff, who had in the meantime sacked and prepared for delivery all the potatoes except about seventy-five sacks, and notified him that he would not take the potatoes, again demanding a return of the twenty dollars advanced and the price of the sacks. Plaintiff refused to comply with such demand, whereupon the defendant



directed the constable to seize and attach all the potatoes in the field, which was accordingly done, and they were placed in the care of a keeper. A few days later, two hundred and seventy sacks of the potatoes so attached were taken to Brooks, where they were later sold, as perishable property, at ten cents a sack, the remainder being left in the field, where they subsequently spoiled. On June 20, 1898, a nonsuit was taken, and the action dismissed.

Thereafter, on July 9, 1898, the defendant commenced another action against the plaintiff to recover damages for an alleged breach of the contract referred to. In his complaint, after setting out the contract, alleging the amount of money he had advanced and the value of the sacks furnished, he averred, in substance, that on May 27, 1898, the plaintiff herein repudiated the contract, and informed him that he would not deliver the potatoes as stipulated, or at all; that upon such refusal he demanded the return of the twenty dollars and the value of the sacks furnished, but plaintiff refused to return the money or pay for the sacks; that the potatoes were purchased for resale, and the plaintiff was so informed at the time; that by reason of the breach of the contract defendant had been damaged in the sum of one hundred dollars as profits on such contemplated transaction, in addition to the money advanced and the value of the sacks furnished. The plaintiff, as defendant in such action, for his answer, denied the breach of the contract as alleged in the complaint, and for an affirmative defense averred, in substance, <sup>468</sup> that on or about the date referred to the defendant proposed to take the potatoes at the farm, to which he agreed, on condition that the balance of the purchase price should be paid before they were taken away, but that defendant wrongfully refused to make such payment, and thereupon notified plaintiff that he would not accept the potatoes, and absolutely refused to receive them; that plaintiff was then, and ever since has been, ready and willing to deliver the whole of the potatoes, and at that time and place, and at divers times thereafter and before the commencement of the action, had offered the whole of them to defendant, and demanded payment of the balance of the purchase price, but that defendant wrongfully refused to accept or pay for them. Such proceedings were thereafter had in the action that a trial in the circuit court resulted in a verdict and judgment in favor of the plaintiff for his costs and disbursements, such judgment being affirmed on

appeal December 24, 1900: *Mitchell v. La Follett*, 38 Or. 178, 63 Pac. 54.

On January 29th following, the present action was commenced by plaintiff against the defendant. The complaint, after setting out the terms of the contract for the sale of the potatoes, avers, in effect, that in pursuance thereof the plaintiff, prior to May 31, 1898, had sacked and put up for delivery all the potatoes mentioned therein, except about seventy-five sacks thereof, and was then, and at all times since has been, ready and willing to perform his contract and deliver the potatoes, as agreed upon, but that the defendant hindered and prevented him from so doing by wrongfully causing the potatoes to be seized under a writ of attachment issued out of the justice's court in the action brought by him against the plaintiff on the 28th of May; that under such writ J. W. Taylor, as constable, seized and held all the potatoes until they had spoiled and become unmarketable, except the two hundred and seventy sacks referred to, and prays for a judgment against the defendant for three hundred and seventy-two dollars and fifteen cents general and seventy-eight dollars and seventy-eight cents special damages. The answer denies all the material allegations of the complaint, and by way of estoppel sets up the proceedings and judgment in the action brought <sup>469</sup> by defendant against plaintiff on July 9th to recover damages for an alleged breach of contract. A reply was filed, putting in issue the material allegations of the answer, and denying that the judgment referred to is a bar to this action. At the trial the plaintiff introduced as evidence the records in the actions against him of May 28 and July 9, 1898, gave oral testimony tending to support the allegations of his complaint, and rested. The defendant thereupon moved for a nonsuit, which, being overruled, he introduced testimony in his defense, and at the close of all the evidence requested a direction to the jury to return a verdict in his favor. This was likewise overruled, and the cause submitted, resulting in a verdict and judgment in favor of the plaintiff, from which the defendant appeals.

The several assignments of error may all be disposed of by a consideration of the motions for a nonsuit and for a directed verdict. The grounds of these motions are: 1. That it was not shown that Taylor, who assumed to attach the potatoes on May 31, 1898, was an officer authorized to serve a writ of attachment; 2. That his return upon the writ is conclusive in this action as to the number of bushels of potatoes attached;

and 3. That the judgment in the former action brought by the defendant against the plaintiff on July 9, 1898, to recover damages for an alleged breach of the contract, is a bar to this action.

1. The first objection is disposed of by the fact that defendant affirmatively alleges in his answer that the writ of attachment referred to was placed in Taylor's hands as constable for service, and that it was in pursuance of his direction and under 470 his instruction that Taylor, as such constable, levied upon and took into his possession two hundred and seventy sacks of potatoes belonging to the plaintiff. It is thus affirmatively asserted that Taylor was the officer he represented himself to be, and that, in seizing the property of the plaintiff he was acting under the instruction and by the direction of the defendant. The defendant, therefore, is concluded by his answer to question the official character or authority of Taylor.

2. Moreover, it is not material whether Taylor had authority to serve the writ of attachment or not. This is an action to recover damages for breach of a contract, and not for a wrongful attachment. The averment in the complaint that the property was seized and attached at the instance and by the direction of the defendant, and the proof in support thereof, were for the purpose of excusing the plaintiff's failure to deliver the potatoes as stipulated in the contract. The allegation and proof were material in order to show either a waiver by the defendant of performance of this provision of the contract, or that by his action and conduct he had made it impossible for the plaintiff to deliver the goods as agreed upon.

3. Nor is the return of the officer, as shown by the record, conclusive between the parties as to the number of bushels attached. There are two returns in the record, from one of which it appears that the officer attached and had in his possession at Jones' warehouse at Brooks two hundred and seventy sacks of potatoes, and the balance were "in the field and sacked"; and from the other that he attached two hundred and seventy sacks, and had them in his possession in the warehouse at Brooks. So that, if the question of the number of bushels attached was to be determined from the officer's return, its correct solution would be difficult. But, as already suggested, the allegation and proof of the attachment are only for the purpose of excusing plaintiff's failure to comply with a condition precedent on his part. The oral proof shows, or tends to show,

that the entire crop of potatoes was seized by the officer, and placed in the custody of a keeper, at the instance and by the direction of the defendant, who was present at the time. This was sufficient for the purposes of <sup>471</sup> this case, whether conforming to the facts as stated in the officer's return or not.

4. The next question has reference to the effect of the judgment in the action brought by the defendant against the plaintiff on July 9, 1898, to recover damages for an alleged breach of the contract set out in the complaint in the present action. A brief reference to the pleadings in the case of *Mitchell v. La Follett*, 38 Or. 178, 63 Pac. 54, is necessary to an intelligent understanding of the question involved. The complaint, after setting out the agreement, alleged, in substance, that on the 27th of May, 1898, La Follett repudiated the contract, and informed Mitchell that he would not deliver the potatoes as stipulated, or at all, and "ever since has and still does refuse to deliver the said potatoes to the plaintiff, or any part thereof"; that upon such refusal Mitchell demanded the return of the twenty dollars and payment for the sacks furnished, but La Follett refused to pay the same, or any part thereof. The answer denied the breach of the contract as alleged in the complaint, and for an affirmative defense averred that on or about the 27th of May, 1898, Mitchell proposed to take the potatoes at La Follett's farm, where they were situated, and La Follett agreed to so deliver them, provided Mitchell would pay the balance due before their removal, which he refused to do, and then and there notified La Follett that he would not accept the potatoes at any time or place, and absolutely refused to receive them, or to pay the balance of the purchase price, although La Follett was then, is now, and ever since has been, ready and willing to deliver them, and at divers times thereafter and before the commencement of the action, offered and tendered to Mitchell the whole of the potatoes, sacks, and twine; that La Follett had duly and fully performed and offered to perform all the conditions and provisions of the contract on his part. There is no dispute under the authorities as to the rule of law that an issue once determined in a court of competent jurisdiction cannot be again litigated between the same parties. But there is a difference, sometimes overlooked, between the effect of a judgment as a bar or estoppel against the prosecution of a second <sup>472</sup> action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or demand. In the former case the judg-



ment, if upon the merits, is an absolute bar, and concludes the parties and their privies, not only as to every matter that was actually litigated, but as to any other that might have been litigated. Where, however, the action, although between the same parties, is upon a different claim or demand, the judgment in the prior action operates as a bar or estoppel only as to those matters directly in issue, and not those collaterally litigated. This distinction is pointed out by Mr. Justice Field with his usual clearness, in *Cromwell v. Sac County*, 94 U. S. 351, and was applied by this court in *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442, and *Applegate v. Dowell*, 15 Or. 513, 522, 16 Pac. 651.

Before, therefore, the judgment in *Mitchell v. La Follett*, 38 Or. 178, 63 Pac. 54, can be invoked as a bar to this action, it must appear that the question now in issue was directly involved in that case and determined therein. Within the meaning of the rule relied upon, a fact or matter in issue is said to be "that upon which the plaintiff proceeds by his action and which the defendant controverts in his pleadings": *Garwood v. Garwood*, 29 Cal. 514; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675. Now, in the former action *Mitchell* proceeded and based his right to recover upon an alleged breach of the contract by *La Follett* on the 27th of May. That was the material allegation in the complaint, which the latter controverted by his answer, and was the subject of inquiry before the court and jury. If the finding and judgment had been in favor of *Mitchell*, *La Follett* would be estopped from alleging in this action anything to the contrary; but, as the action resulted in a final judgment in favor of *La Follett*, it constituted an adjudication that there had been no breach of the contract on his part, but did not determine that *Mitchell* himself had not violated the terms and conditions thereof. That question was not involved in the former controversy, and the judgment therein is no bar to this action. The plaintiff was not obliged to set up in the former action a breach of the contract by the defendant, <sup>473</sup> for the purpose of recovering damages therefor: *Freeman on Judgments*, 3d ed., secs. 227, 228. And, as said by Mr. Justice Field in *Cromwell v. Sac County*, 94 U. S. 351: "It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although

loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been determined in the first action." So we conclude that the judgment in the former action between the same parties to this record is in no way a bar to this, because the point now in controversy was neither involved nor litigated there.

5. It is insisted, however, that the position assumed by the plaintiff in the present case is consistent with his answer in the former one, because it was there alleged that he had offered to deliver the whole of the potatoes to the defendant, and was able and willing to perform the contract on his part. That action, however, was grounded on the repudiation of the contract by the plaintiff before the time for delivery had arrived. That was the gist of the controversy, and the only question really litigated and settled by the judgment. The mere inconsistency, if there is any, between some of the allegations of plaintiff's answer in the case referred to and the position he now assumes, does not estop him from maintaining this action, because the defendant has not been misled or injured thereby, and therefore has no cause of complaint on that ground. The evidence does tend to show that the plaintiff was ready and willing at all times to comply with the terms of his contract and deliver the potatoes as agreed upon, and so notified the defendant in writing, but that he was prevented from doing so by the wrongful acts of the defendant. It is therefore doubtful whether the allegations of his answer in the former action are in any substantial sense inconsistent with the position now <sup>474</sup> assumed by him. But, whether they are or not, they afford no reason why the judgment therein should be considered as an estoppel or conclusive bar to this case.

It follows from these views that the judgment of the court below should be affirmed, and it is so ordered.

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*The General Rules of Res Judicata* are stated in the recent cases of *Garden City v. Merchants'* etc. Nat. Bank, 65 Kan. 345, 93 Am. St. Rep. 284, 69 Pac. 325; *White v. Ladd*, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739. When a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those issues upon the determination of which the finding or judgment is rendered, and does not extend to matters which might have been, but were not, litigated and determined in the former action: *Pitts v. Oliver*, 13 S. Dak. 561, 79 Am. St. Rep. 907, 83 N. W. 591. See, also,

Freeman v. Barnum, 131 Cal. 386, 82 Am. St. Rep. 355, 63 Pac. 691; Hunter v. Hunter, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33. If, in an action to recover the contract price of services rendered, the defendant recovers judgment on the ground that the contract has not been completed, such judgment is not a bar to a second action to recover the reasonable value of the same services: Rossman v. Tillyen, 80 Minn. 160, 81 Am. St. Rep. 247, 83 N. W. 42.

CASES  
IN THE  
SUPREME COURT  
OF  
SOUTH CAROLINA.

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EDWARDS v. WESSINGER.

[65 S. C. 161, 43 S. E. 518.]

**DAMAGES—Assault and Battery.**—Evidence of a prosecution and acquittal for an assault and battery cannot be given to mitigate the damages in a civil action for the same offense. (p. 791.)

**TRIAL—Instructions.**—The trial court is not bound to charge the jury in the exact words of the request, nor is it bound to charge a request covered by the general charge. (p. 793.)

**HUSBAND AND WIFE—Married Woman's Torts.**—If a wife commits a tort in the presence of her husband, it is presumed that she is coerced by him, and he alone is liable therefor, but if she acts deliberately, freely, and independently, it is their joint tort, and they are jointly liable. (p. 794.)

G. T. Graham and Efrd & Dreher, for the appellant.

E. McClarkson and A. Crawford, for the appellees.

**163 GARY, J.** This is an action for damages, in which the plaintiff alleges that: "On or about the second day of September, 1900, at plaintiff's home in the county of Lexington, in the state aforesaid, the defendants, coming together and aiding and abetting each other, wrongfully and unlawfully entered upon the premises aforesaid and upon the back piazza of the residence thereon, and then and there did beat and bruise, wound and ill-treat this plaintiff, and did, in a brutal manner, deliberately and repeatedly strike this plaintiff over the head with a heavy stick or club, and did seize and pull her hair, and drag and pull her about and over said piazza and premises, and did repeatedly strike her with clenched fists in and upon the head, while two boys accompanying said defendants upon their preconceived and prearranged design to commit



said trespass and assault and battery, did stand at the side of said defendants with open knives in hand, and while she was being abused and vilified and denounced by said defendants; whereby the plaintiff was humiliated and degraded and imposed upon, and whereby she suffered great nervous shock, and whereby she was injured in her person and rights to her damage ten thousand dollars."

The defendants answered, denying generally the allegations of the complaint and interposing as a defense in mitigation of damages: "That on or about the fourth day of September, 1900, the plaintiff swore out a warrant before H. A. Meetze, a magistrate of said county, charging the defendants and their son, Chalmers Wessinger, with an <sup>164</sup> assault and battery and riot, on the second day of September, 1900, as alleged in the said complaint, and undertook to bind over the above-named defendants; but said case having been transferred to Magistrate Corley, and a preliminary examination being had on the twenty-second day of September, 1900, the said magistrate, after taking the testimony of the witnesses for the prosecution in said case, did adjudge that said case was triable by a magistrate; and thereafter, on the thirteenth day of October, 1900, upon the trial of said case, the said magistrate did discharge and acquit the defendants of the said charge." They also alleged that at the time of the alleged assault and battery, the defendant, Elizabeth Wessinger, was, and still is, the wife of the defendant, Vastine Wessinger. The jury rendered a verdict in favor of the plaintiff for one thousand five hundred dollars.

The appellant's first exception assigns error: "In that the presiding judge erred in the recipiency of the testimony in regard to the result of a trial of issues raised in the case in a magistrate's court on the criminal side, when objection was made to the reception of oral evidence thereof, by saying that, 'I don't think it amounts to a row of pins one way or the other, but I will let it come out,' thereby impressing upon the minds of the jury that the result of trial could have no effect in this, and the error was, that he thereby gave the jury his impression of the evidence and induced them to believe that the same was of no value and force; whereas, it is respectfully submitted that the evidence was of value and force, not as a bar to this action, but in mitigation of damages." Section 7 of the Code is as follows: "Where the violation of the right admits of both a civil and a criminal remedy, the right to prosecute the one is not merged in the other." In the case of *Wolff v. Cohen*, 8 Rich. 145,

which was an action for assault and battery, the court, in considering an exception assigning error on the part of the circuit judge, in charging the jury that they could not consider the criminal prosecution and the consequent punishment of the defendants as circumstances in <sup>165</sup> mitigation of damages, thus stated the rule: "The indictment and civil action are prosecuted for the same trespass, but not by the same parties. One is an offense against society, the other is a private wrong. The state punishes for a breach of public peace; the individual recovers damages for the injury of his person, and where the compensation is beyond the actual loss, it may operate, incidentally, as a penalty, but not as a cumulative remedy. If the punishment of the offenders should be permitted to influence the jury in their estimate of damages, the private remedy which the law gives to the injured party would be adjudged. When the prosecutor receives a part of the pecuniary penalty, it has been held that his damages should be nominal (*Jackson v. Bell*, 3 Car. & P. 316); but in this state he is entitled to none of the penalty, and is not restrained from prosecuting both the indictment and civil action together. In *Cook v. Ellis*, 6 Hill (N. Y.), 466, 41 Am. Dec. 757, the court did not regard the probable or actual punishment of the defendant by indictment in an action for damages. The parties, the nature of the offense and the remedies are different; and where circumstances of aggravation call for vindictive and punitive damages, the range of the jury's discretion should not be narrowed by the sentence of the court." The rule prevails with even stronger force in this case, as the parties were acquitted before the magistrate.

The second exception is as follows: "2. That the presiding judge erred in his charge to the jury: (a) In that his honor, by instructing the jury, 'If you think she is entitled to damages, you can find from one cent to ten thousand dollars, that is a matter exclusively for you,' the error being that the jury was not instructed as to whether they should give actual or vindictive damages, or both, and in failing to define these different kinds of damages. (b) That his honor erred in instructing the jury as follows: 'The law presumes in a case of this sort, that if the wife committed an offense of this kind in the presence of her husband, that she is coerced to it, forced by him to do it; that's the presumption, but it can be rebutted by testimony, and where in the trial of a cause like <sup>166</sup> this, if the testimony satisfies the jury that if the husband were present and the wife were the better man of the two, as it were, acting independently,

acted on her own free will, according to her own volition, that presumption is dissipated, and a verdict could be found against her the same as against her husband. But if the wife commits an offense in the presence of her husband and he instigates her to do it, and she is acting under his direction, the law presumes her to be coerced, and in a case of that sort she is not responsible for the commission of a misdemeanor in the presence of her husband. But if a man and a wife go to a place together, or meet a party on the street, and they commit an assault, and the wife acts independently of her husband, acts on her own volition, and the husband does not coerce her, does not instigate her, but she acts freely and voluntarily, then she would be as much liable for the commission of the misdemeanor as if her husband was not present. If you are satisfied in this case that both the defendants committed an assault and battery upon the person of the plaintiff, and they did it without legal justification or excuse, and that the wife was not coerced by her husband, not commanded or instigated by him to do it, but that she acted of her own free will, according to her own volition, acted independent of him, was not ordered by him and was not afraid of him, but acted just the same as if he were not there, then she would be as much liable as he; if both committed the assault, without legal justification or excuse upon the person of the plaintiff, you will give such damage proportionate to the injury sustained as in your opinion you think the plaintiff is entitled. If you think the defendant did not commit an assault and battery, or if you think they acted in self-defense, then your verdict would necessarily be for the defendants; or if you think Mrs. Wessinger committed an assault, and that she was coerced by her husband to do it, and her husband took a hand in it, your verdict would be against the husband only. If you think they acted together, and she acted independent of him, on her own accord, her own volition, your verdict would be against **167** both. . . . The defendants have requested me to charge you the following proposition of law: 'The jury is charged, if they find the defendant, Elizabeth Wessinger, committed a tort by assaulting and striking the plaintiff in the presence of her husband, I. V. Wessinger, or at his instigation, then the defendant, I. V. Wessinger, alone would be responsible for it; and the jury under such circumstances could not hold her responsible for the tort.' I charge you that a little differently from what is laid down here. I charge you this: 'The jury is charged that, if they find the defendant, Elizabeth Wessinger, committed a tort by

assaulting and striking the plaintiff, in the presence of her husband, I. V. Wessinger, at his instigation, then the defendant, I. V. Wessinger, alone would be responsible for it, and the jury under such circumstances could not hold her responsible for the tort.' Strike out the word 'or,' and I charge you that.' The error being that his honor first laid down the doctrine correctly that the mere presence of the husband with the wife during the commitment of an assault and battery raised the presumption of coercion on the part of the husband and then modified the doctrine by instructing the jury that the husband alone is responsible only in those cases where he instigated and commanded the commission of the offense by the wife; thereby instructing the jury that they could not find against the husband only and for the wife in those instances where the husband was simply present and coercion would be presumed; and this idea he impressed upon the jury more clearly by the modification of the defendants' request as above set forth."

The assignment of error marked "(a)" seems to have been taken under misapprehension, as the record shows that the presiding judge charged the jury as follows: "By vindictive damages we mean wherever there has been a willful invasion of the rights of another party, does it willfully and recklessly, runs over them in a high-handed, outrageous manner, juries in a case of that sort can charge not only such damages <sup>168</sup> as the person actually sustained, but such damages in the way of punishing."

We will next consider the assignment of error marked "(b)." The trial judge is not bound to charge the jury in the exact words of the request, nor is he bound to charge a request when the proposition of law therein stated is approvingly submitted to the jury in his general charge.

If it was the intention of the defendants in submitting the request that his honor should charge the jury the proposition of law, that the mere presence of the husband, during the commitment of an assault and battery, raised the presumption of coercion on the part of the husband, then it was wholly unnecessary, as the presiding judge in his exceedingly able and lucid charge stated such to be the law. But if they intended to submit the proposition that if the wife committed the assault and battery in the presence of her husband, that he alone would be responsible for it, although there was no coercion on his part, and she acted independently of him, then it was erroneous. The request as modified contained a sound proposition of law,



for it simply made the husband alone responsible if the wife committed the assault and battery at his instigation. The charge of the circuit judge is fully sustained by the case of *Henderson v. Wendler*, 39 S. C. 555, 17 S. E. 851, in which the court says: "Exceptions 3, 4, 5 and 6 make the point that a married woman cannot be made liable for tort committed in the presence of her husband, without proof showing that she acted voluntarily and willfully. The doctrine upon the subject of the liability of the husband for the tort of the wife committed in his presence is truly stated in the case of *State v. Houston*, 29 S. C. 112, 6 S. E. 944, as follows: 'In the case of *State v. Parkerson*, 1 Strob. 170, Judge Withers, in delivering the opinion of the court, said: "It is a mistake to affirm that a wife may not be indicted, convicted and punished in conjunction with her husband. While it is true, that if she committed a bare theft, or even a burglary, by the coercion of her husband, she <sup>169</sup> will not suffer punishment, and while it is also laid down that coercion is to be presumed from his presence, still it is quite clear that this is only one of those presumptions or inferences classed as *prima facie*, that may be rebutted by testimony, and hence presents a question for the jury, etc.'" From this it appears that in this state the question of coercion is an open one.'" The court then quotes with approval the following from volume 9 of the *American and English Encyclopedia of Law*, 824, as follows: "1. If the tort is committed in the presence of the husband and nothing more appears, it is his sole tort, as the wife is considered to have acted under his coercion. 2. If the tort is committed in his presence, but she appears to have acted deliberately and freely, it is their joint tort. 3. If the tort is committed in his presence and against his will, it is her tort, and he is liable with her. 4. If the tort is committed out of his presence but by his direction, she is jointly liable with him. 5. If the tort is committed out of his presence and without his knowledge or consent, he is liable with her."

It is the judgment of this court that the judgment of the circuit court be affirmed.

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*The Liability for the Torts of married women is considered in the monographic notes to Henley v. Wilson, 92 Am. St. Rep. 164-170; Brazil v. Moran, 83 Am. Dec. 776-778; Commonwealth v. Neal, 6 Am. Dec. 106-109.*

## STATE v. BOWERS.

[65 S. C. 207, 43 S. E. 656.]

**MANSLAUGHTER—Definition.**—Manslaughter is properly defined as a blow struck “out of a hot heart, heart full of passion, full of anger, and yet not full of sin,” especially when the jury have been informed that a blow struck “out of a malicious heart, sinful heart” is murder. (p. 799.)

**MURDER.—Self-defense** exists when one kills another of necessity. It exists when one finds himself in a position of imminent peril, either to himself or to another in peril of his life, or of serious bodily harm, and then strikes to save his life, or to save his body from serious harm, or to save the life of another, or to save the person of the latter from serious bodily harm. (p. 800.)

Hayward, Dean & Earle, for the appellant.

J. E. Boggs, solicitor, for the state.

**208** POPE, C. J. The question presented by this appeal is whether the circuit judge, his honor, Judge Gage, in his charge to the jury, correctly set forth the law of this state defining the crime of manslaughter, of which the defendant was convicted by the jury. It is but just to the presiding judge that his entire charge should be reproduced. It is as follows: “Gentlemen of the jury: I am not going to say much to you in this case, because it is not necessary for me to say much. The features of this case lie within a very narrow compass. If you are satisfied that Alexander Bowers killed James Howard, then you have only one inquiry to make, and that is, How did he come to kill him? It is unlawful for one man to kill another. So that your next inquiry is, How did Alexander Bowers come to kill James Howard? I charge you that if he killed him in self-defense, you will acquit him or excuse him. Now self-defense means, gentlemen, just what these words imply. It means that when one man kills another of necessity. It exists when one man finds himself in a position of peril—imminent peril either to himself or to another; in peril of his life, or in peril of serious bodily harm; and where he finds himself in that position, and strikes to save his life, or strikes to save his body from serious harm, or to save the life of another person, or to save another person from serious bodily harm, the **209** law constitutes that self-defense; and if you believe the defendant in this case did that, then you should render a verdict of not guilty. If you find out that he did not do that, gentlemen, then

you will disregard self-defense, and go one step farther, and see if there is another defense, and that is what is called defense of the castle. That means this, gentlemen: it is different from self-defense. If a man has a home, a residence, and living in it, and another man undertakes to drive him out, he has a right to kill him to keep him out. That is the law. When a man enters his home and another man comes to take him out, go into the house by force, break in, any occupant of the house has a right to kill him and keep him out. Now, if you believe that state of facts, you should render a verdict of not guilty; if you don't believe that state of facts, you should disregard it and render a verdict of guilty; there is where the office of the jury comes in. Gentlemen, I can tell you what the law is, but it is for the jury to say what the facts are. It is for the jury to say whether or not Alexander Bowers struck on that day, if he did strike, to save his life or his body from serious harm, or to save his wife and children from serious harm. I tell you, if he did, you will acquit him. Whether or not he did is a matter for you. I tell you, if Alexander Bowers struck to keep the man from entering his house, the law acquits him. Whether or not he did do that, is a question for you.

“If you decide both of these defenses against Alexander Bowers, then you go one step farther, and inquire out of what sort of heart he did this killing. I tell you, if he did it out of a malicious heart, sinful heart, it is murder, and the penalty is death. You might ask yourselves, How are you to determine upon a human heart? That is the province of a jury every day. Just like a surgeon looks at a sick man's tongue . . . so jury-men look upon a man's hands and tell what motive prompted his heart. I tell you, if Alexander Bowers struck this blow out of a heart full of sin and malice, that is murder. Whether or not he had that sort of heart, is a matter for you. If you are satisfied that he did have that <sup>210</sup> sort of heart, render a verdict of guilty if you have reasonable doubt about it, write a verdict of not guilty of murder. If you acquit him of murder, then your next inquiry is, Is he guilty of manslaughter? The difference between manslaughter and murder is like the difference between day and night. Manslaughter is, as I told you, where a man strikes out of a hot heart; heart full of passion, full of anger and yet not full of sin. If he strikes out of that sort of heart, the law denominates it manslaughter, and the penalty is imprisonment for a series of years. That is all I have to say to you except about the matter of reasonable doubt. Alexander

Bowers is put on trial here for a serious crime, and it is the business of the state in every case to satisfy the jury beyond a reasonable doubt of a man's guilt. Now, reasonable doubt, gentlemen, means just what the words imply. If I should tell you what an unreasonable man was, you would know what I meant; if I should tell you what a reasonable man was, you would know what I meant. Therefore, you must understand, when I say to you, if you have a reasonable doubt about this man's guilt, you must find him not guilty; and if you have no such doubt of this man's guilt, if you are satisfied beyond a reasonable doubt of his guilt, you should render a verdict of guilty.

"Now, gentlemen, as to the form of your verdict. If you believe that he struck this blow in self-defense, write a verdict of not guilty. If you believe he struck this blow to keep James Howard from entering his house, write a verdict of not guilty. If you disbelieve both of these defenses, and believe he struck out of a malicious heart, write a verdict of guilty. If you believe he did not strike out of a hard heart, write a verdict of manslaughter. With reference to a general verdict of guilty: Gentlemen, it is proper for me to say to you, in special cases that it is proper for the jury to recommend a party to mercy; that practically gives them the right to fix the penalty. No man can forfeit his life under the laws of this country except by consent of a jury. To recommend a party to mercy is to thereby save his life, and the <sup>211</sup> law fixes the punishment at lifetime imprisonment. Now, gentlemen, this a solemn business for you. I am going to put it where the law puts it, where the constitutional law puts it, upon your shoulders. This is your country. The defendant at the bar is your fellow-citizen; the dead man was your fellow-citizen. Whatever your verdict be, gentlemen, write it upon the back of this indictment, and sign your name as foreman."

The following grounds of appeal are presented:

"1. Because the judge erred in charging the jury as follows: 'Now, gentlemen, as to the form of your verdict. If you believe that he struck this blow in self-defense, write a verdict of not guilty. If you believe he struck this blow to keep James Howard from entering his house, write a verdict of not guilty. If you disbelieve both of these defenses and believe he struck out of a malicious heart, write a verdict of guilty. If you believe he did not strike out of a hard heart, write a verdict of manslaughter.' The error being that the language, 'If you believe he did not strike out of a hard heart, write a verdict of



manslaughter,' is ambiguous, indefinite, incorrect, and was misleading to the jury—especially so when the record shows that said language was used just as the judge was closing his charge to the jury, and he not having previously clearly charged the law of manslaughter.

"2. Because the circuit judge erred in not charging the law of manslaughter, thereby violating the provisions of article 5, section 26, of the constitution of South Carolina, which provides: 'Judges shall not charge juries in respect to matters of fact, but shall declare the law.'

"3. Because the circuit judge erred in charging the jury as follows: 'Murder is, as I told you, where a man strikes out of a sinful heart. Manslaughter is when he strikes out of a hot heart: heart full of passion, full of anger, and yet not full of sin. If he strikes out of that sort of a heart, the law denominates it manslaughter, and the penalty is imprisonment for a series of years.' The error being that the said <sup>212</sup> definition is not the legal and true definition of that offense, and it is uncertain in its terms and meaning, and was, therefore, erroneous and misleading to the jury.

"4. Because the circuit judge erred in charging the following as the law of self-defense: 'I charge you, if he killed him in self-defense, you will acquit him. Now, self-defense means, gentlemen, just what those words imply. It means that when one man kills another of necessity. It exists where one man finds himself in a position of peril—imminent peril either to himself or to another in peril of his life, or in peril of serious bodily harm; and where he finds himself in that position and strikes to save his life, or strikes to save his body from serious harm, or to save the life of another person from serious bodily harm, the law constitutes that self-defense; and if you believe the defendant in this case did that, then you should render a verdict of not guilty.' Whereas, he should have charged that the jury should render a verdict of not guilty, if they believed from the evidence that the accused was without fault in bringing on the difficulty, and that the defendant believed at the time of the killing that he was in imminent danger of losing his life or of receiving serious bodily harm, and that a person of ordinary reason and firmness, placed under like circumstances as the defendant was placed at such time, would have been warranted in believing that he was in such danger. Error is imputed to the judge in not charging the law of self-defense, thereby violating the provisions of article 5, section 26 of the

constitution of South Carolina, which provides, 'Judges shall not charge juries in respect to matters of fact, but shall declare the law.'"

Let us now pass upon these grounds of appeal in their order.

1. In our criminal statutes, murder is described in these words: "Sec. 108. Murder is the killing of any person with malice aforethought, either express or implied." And manslaughter is described therein: "Sec. 120. Manslaughter, or the unlawful killing of another without malice, express or implied." Murder <sup>213</sup> in this state is not a statutory offense; it is still a common-law offense: *State v. Coleman*, 8 S. C. 237; and the same is true of the crime of manslaughter. Therefore, when a circuit judge comes to charge the jury as to these two crimes, so long as he preserves intact the fundamental requirements of these two sections of our criminal statutes, he has not transgressed the law. Malice aforethought, either express or implied, must be preserved in a charge upon murder: and the absence of malice, though the killing is unlawful, must be preserved in charge upon manslaughter. It is very evident that in the charge of the circuit judge he preserved these rules; for as to murder he says: "If he did it [the deed] out of a malicious heart, sinful heart, it is murder." Thus the circuit judge emphasized malice as an essential ingredient in the crime of murder. The circuit judge here paints what he calls a "sinful heart," a "hard heart," and in such words that a jury could not mistake his meaning; and when he comes to define "manslaughter," he says: "Manslaughter is when he strikes out of a hot heart, heart full of passion, full of anger, and yet not full of sin." The circuit judge had just told the jury that the sinful heart was a malicious heart; so, therefore, when in regard to manslaughter, he tells the jury that the heart of the accused was not full of sin, he meant a heart void of malice, and the jury understood him. See how careful he is to say, out of "hot heart," "heart full of passion," "full of anger," and "yet not full of sin." If we were required, we might admonish circuit judges in their charges to avoid the use of moral terms, but rather to cling to the established legal nomenclature in defining the offenses of murder and manslaughter. This exception is overruled.

2. We do not find that the circuit judge failed to charge the law as to manslaughter—indeed, we have just held that the terms used by him clearly pointed out the legal significance of that crime. The absence of malice, the sudden heat and passion, all appear in his charge. Hence he did not violate the

provisions of article 5, section 26 of the constitution <sup>214</sup> of this state, which required judges to charge or declare the law. This exception is overruled.

3. We have already, under the first ground of appeal, disposed of this exception, and it is, therefore, overruled.

4. We cannot sustain this exception. In regard to self-defense, we think the circuit judge correctly brought before the jury in his charge the law applicable to the case then at the bar of his court, for in the absence of the testimony (for the same is not embraced in the case of appeal), we must assume that the circuit judge had in his mind that the facts of this cause warranted him in so shaping his charge to meet the requirements of this case. The case of *State v. McGreer*, 13 S. C. 466, does not and could not lay down the law as an unchangeable rule to govern every case but rather it was intended to fit the rule to the facts there set up, and, of course, all similar cases. A circuit judge in his charge must adopt the language to make clear the principles of the law so that juries could clearly understand the same. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court herein be affirmed.

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*Manslaughter* is the killing of a human being under the influence of sudden heat and passion brought on by a reasonable provocation: *State v. Ferguson*, 2 Hill, 619, 27 Am. Dec. 412. It may be voluntary, upon a sudden heat, or involuntary in the commission of an unlawful act: *McWhirt's Case*, 3 Gratt. 594, 46 Am. Dec. 196; *Sutcliffe v. State*, 18 Ohio, 469, 51 Am. Dec. 459; *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711. Manslaughter differs from murder in this, that the former proceeds from a sudden heat of passion, and the latter from wickedness of heart. Malice aforethought is the grand criterion which distinguishes murder from other killings: *McWhirt's Case*, 3 Gratt. 594, 46 Am. Dec. 196. See, too, *Holmes v. State*, 88 Ala. 26, 16 Am. St. Rep. 17, 7 South. 193; *Menly v. State*, 26 Tex. App. 274, 8 Am. St. Rep. 477, 9 S. W. 563; *Cryer v. State*, 71 Miss. 467, 42 Am. St. Rep. 473, 14 South. 261; *State v. Davis*, 50 S. C. 405, 62 Am. St. Rep. 837, 27 S. E. 905; *Perugi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865, 80 N. W. 593; *King v. State*, 68 Ark. 572, 82 Am. St. Rep. 307, 60 S. W. 951; *State v. Doherty*, 72 Vt. 381, 82 Am. St. Rep. 951, 48 Atl. 658; *State v. Foster*, 130 N. C. 666, 89 Am. St. Rep. 876, 41 S. E. 284.

*The Law of Self-defense* is the subject of a monographic note to *State v. Sumner*, 74 Am. St. Rep. 717-740. One may protect his own life or that of another from attack to the extent of taking life, if it reasonably appears necessary to the preservation of life or limb: *State v. Bonofiglio*, 67 N. J. L. 239, 91 Am. St. Rep. 423, 52 Atl. 712, 54 Atl. 99; *Utterback v. Commonwealth*, 105 Ky. 723, 88 Am. St. Rep. 328, 49 S. W. 479; *Palmer v. State*, 9 Wyo. 40, 87 Am. St. Rep. 910, 59 Pac. 795; *Bullock v. State*, 65 N. J. L.

557, 86 Am. St. Rep. 668, 47 Atl. 62; Elder v. State, 69 Ark. 648, 86 Am. St. Rep. 220, 65 S. W. 938; Wood v. State, 128 Ala. 27, 86 Am. St. Rep. 71, 29 South. 557.

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## STATE v. COBB.

[65 S. C. 324, 43 S. E. 654.]

**MURDER—Bringing on Difficulty.**—If one person prepares with deliberation and brings on a difficulty with another, with the intention of killing the latter if he resents the insult, and he does resent and is killed by the former, the killing is murder. (p. 802.)

Butler & Osborne and W. N. Hardin, for the appellant.

Assistant Attorney General Townsend, for the state.

**324 WOODS, J.** The appellant, Son Cobb, was convicted of murder, with recommendation to mercy, at the March term, 1902, of the court of general sessions for Cherokee county, and was sentenced to life imprisonment. The exceptions allege several errors in the charge of the presiding judge, but they were all abandoned in the argument except the second, which is as follows: "2. For error in the instruction to the jury, as follows: 'If a man makes preparation with deliberation that way to go and raise a row with the other, with the intention of killing <sup>325</sup> the other, if the other resents the insult or strikes him, and he kills him, that is murder'; the error herein being this: the defendant herein, by so charging, was cut off from the plea of self-defense in the minds of the jury, and the jury might have reasonably inferred that the 'other' might 'resent the insult or strike him' in the most violent manner, endangering the life of the 'man,' and he would have no right to kill the 'other' to save his own life."

The sentence to which appellant takes exception occurs in the following paragraph of the charge: "Now, the law is this: That if two men have bad blood toward each other, and one goes and prepares himself to take the life of the other, and does it with the intention of saying something to the other man to provoke him to resent any insult or to pick a row, and he has got ready for it and intends to take life as soon as he says something to the other fellow, and the other fellow resents it—if a



man kills another under circumstances of the kind, he is guilty of murder, because there is a deliberation and preparation beforehand to take life; the intention, if the man does resent it, he has prepared himself to kill him. He has brought on the attack. If a man makes preparation with deliberation that way to go and raise a row with the other, with the intention of killing the other if the other resents the insult or strikes him, and he kills him, that is murder." The correctness of this interpretation of the law is no longer subject to controversy in this state: *State v. Beckham*, 24 S. C. 284.

The appellant insists that if the charge in this respect was correct, it was not applicable to the case. The evidence is not printed in the brief submitted to the court, and we, therefore, must assume the charge was appropriate to the case before the court.

The judgment of this court is that the judgment of the circuit court be affirmed.

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*Murder.*—If a difficulty is sought by the defendant with the deceased for the purpose of beating or chastising him, and in pursuance thereof the defendant arms himself with a pistol to be used in case of necessity, and with it kills the deceased in pursuance of such purpose, the killing is murder, although it was necessary to use the pistol in self-defense: *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96, 8 South. 98. See, also, the monographic note to *State v. Sumner*, 74 Am. St. Rep. 731-735.

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## SCHUMPERT v. SOUTHERN RAILWAY.

[65 S. C. 332, 43 S. E. 813.]

**PLEADING—Motion to Make Definite.**—If a complaint alleges acts as being done both negligently and willfully, defendant's remedy is not by demurrer, but by motion to make more definite. (p. 804.)

**PLEADING.—Acts of Negligence and Acts of Willful Tort** may be commingled in one statement as causing an injury, if such pleading is sanctioned by statute, and the adverse party cannot require a separate statement of such acts, nor an election upon which plaintiff will go to trial. (p. 804.)

**MASTER AND SERVANT are Jointly Liable as Joint Tort Feasors**, for the tort of the servant committed within the scope of his employment and while in the master's service, whether the master is present or not. (p. 807.)

**NEGLIGENCE—Question for Jury.**—The question whether the negligence alleged in the complaint caused the injury is properly left to the jury to determine under proper instructions. (p. 809.)

T. P. Cothran, for the appellants.

Johnston & Welch, for the appellees.

**333** JONES, J. The plaintiff brought this action to recover damages for personal injuries sustained by him in a head end collision, at Belton, South Carolina, February 18, 1901, between two trains of the defendant company, on one of which plaintiff was engineer and on the other the defendant, Hutchison, was engineer. The circuit court, after trial and verdict, rendered judgment against both defendants for **334** ten thousand dollars, which is now sought to be reversed upon the following grounds:

1. Alleged error in refusing to sustain the demurrer to the complaint. For this question it will be sufficient to set out the thirteenth and fourteenth allegations of the complaint: "13. That the said loss, injury and damage to the plaintiff was caused in the following manner, to wit: 1. In the failure of the defendant, Southern Railway Company, to properly make the air-brake attachments and connections upon trains No. 68, after, as before set out, the several cars composing this train had been shifted at Williamston, and in thus failing to do its duty as laid down and prescribed in the rules of said company covering such matters, as it was in law duty bound to have done; 2. In the use and occupancy by the Anderson Branch engine and cars of said main line upon the time and schedule of the regular train No. 68, without taking the necessary and required protections and precautions as prescribed in the said rules covering such matters and in the law the defendants were duty bound to have done; 3. And in meeting train No. 68 with the said Anderson Branch engine and cars upon the said main line, when it was or should have been known that the said train was approaching the said station of Belton and was due to approach the same. 14. That the aforesaid loss and injury and damage to the plaintiff done and occasioned in the manner aforesaid was caused by the joint and concurrent willful misconduct, gross negligence and inattention to duty on the part of the defendants." The ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action, in that the complaint charges that the acts complained of were both willful and negligent, this being an impossibility. When analyzed, this objection goes to the manner of stating traversable facts and not to any omission of an averment necessary to constitute a cause of action. Considered with reference to an

action for willful tort, the complaint states a cause of action, for the acts of wrong are stated and are characterized as willful. Considered <sup>335</sup> as action for mere negligence, a cause of action is stated, for the acts complained of are stated and characterized as carelessly or negligently done. The objection merely presents a case of repugnancy or inconsistency in the manner of statement, and is to be remedied, if at all, by a motion to make definite and certain, and not by general demurrer for insufficiency, which, according to Bliss on Code Pleading, section 413, is proper when the complaint "shows that no legal wrong has been done, or that the law will not redress it, or that the party has mistaken his remedy, or when there has been an omission of some material averment necessary either to establish the wrong or to so connect the parties with it as to entitle the plaintiff to redress." The act of 1898, now incorporated in the Code of Civil Procedure as section 186a, prevents from securing any very scientific method of pleading in actions ex delicto, when two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to the injury for which the suit is brought. Under this statute, acts of negligence and acts of willful tort may be commingled in one statement as causing the injury, and the adverse party cannot require a separate statement of such acts of negligence, or willful tort or other wrongs, nor an election upon which the plaintiff will go to trial: *Boggero v. Southern Ry. Co.*, 64 S. C. 104, 41 S. E. 819; *Proctor v. Southern Ry. Co.*, 64 S. C. 494, 42 S. E. 427.

The exceptions to the refusal of the motion for nonsuit and some of the exceptions to the charge raise the question whether the master and servant are liable as joint tort-feasors for the tort of the servant committed within the scope of his employment and while in the master's service. The complaint alleged that plaintiff's injury was the result of the "joint and concurrent willful misconduct, gross carelessness and negligence and inattention to duty on the part of the said defendants." The evidence tended to show that the injury was occasioned by a collision between the train on which the defendant, Hutchison, was engineer and the train on which plaintiff was engineer, resulting from the <sup>336</sup> negligence or misconduct of Hutchison in moving his engine and train from the Anderson Branch line upon the main line, without protection against the regular freight train on which plaintiff was engineer, which at the time of the collision was within its time and due at any moment. A rule of the defendant company required that "engines working

within these limits may use the main track, keeping out of the way of all regular trains, but they must not occupy the main track on the time of such regular trains, except under proper protection." There was some evidence tending to show, and the jury made special finding, that plaintiff was operating his engine and train with the care due under the circumstances, and that train No. 58, with Hutchison as engineer, was upon the main line without flagman and without protection, in violation of the rule and the custom. Appellants do not dispute the proposition that the master is liable for the negligence of the servant within the scope of his employment, nor do they dispute that the servant is also liable for his own tort. The contention is that there is no joint liability unless the master directs or is present, actively co-operating with the servant in the commission of the tort. There is undoubtedly some authority for this view, as shown by the cases cited in appellants' brief, and by reference to the citations found in 15 Encyclopedia of Pleading and Practice, 560, 561, and the note in 28 L. R. A. 441, 442. The leading case for such view is *Parsons v. Winshell*, 5 Cush. 592, 52 Am. Dec. 745, wherein the court held that master and servant are not jointly liable for servant's negligence in the master's absence in so driving a team as to cause an injury to another. In the view of that court, "the act of a servant is not the act of the master, even in legal intentment or effect, unless the master previously directs or subsequently adopts it. In other cases he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor." The principal reason assigned for this view is that if master and servant were made jointly liable, the master could not call on the servant for contribution <sup>337</sup> in case he should satisfy the execution. But as it appears in the note to the case, cited in 52 Am. Dec. 748, the Massachusetts court, in *Hewett v. Swift*, 3 Allen, 425, held that a joint action in the nature of trespass would be against a corporation and its servant for personal injury inflicted by the latter in discharging duties imposed by the corporation. *Parsons v. Winshell*, 5 Cush. 592, 52 Am. Dec. 745, was an action on the case, and *Hewett v. Swift*, 3 Allen, 425, was in trespass under common-law pleadings, which made a distinction between the remedies for injuries with force and injuries without force. All such distinctions are abolished under the code. With reference to the matter of contribution which is suggested as presenting a



difficulty in the way of holding the master and servant jointly liable, Mr. Cooley in his work on Torts, at pages 144, 145, after stating the general rule as to contribution between wrongdoers, says: "But there are some exceptions to the general rule, which rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet as between themselves some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others. A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and its servants to responsibility, but the actual wrong, so far as it is one in the morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself." Furthermore, the reason assigned in the Massachusetts <sup>338</sup> case, that the act of the servant is not the act of the master, even in legal intendment or effect, unless the master directs or adopts it, is not consistent with the liability of the master for the acts of the servant, as held in this state. In *Rucker v. Smoke*, 37 S. C. 380, 34 Am. St. Rep. 758, 16 S. E. 40, the ground of the master's liability is thus stated: "When one person invests another with authority to act as his agent for a specified purpose, all of the acts done by the agent in pursuance or within the scope of his agency are and should be regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him." By legal intendment and effect the act of a servant within the scope of his agency is the act of the master. In such case there is a legal identification of the master and servant. In the case of a railroad corporation, which owes important duties to the public or those affected by its operation, and which cannot act, except through agents, there is the strongest reason for holding that with respect to

acts done in its service by the agents within the scope of their employment, the corporation is present acting through its agents. "Qui facit per alium facit per se." The servant is liable because of his own misfeasance or wrongful act, in breach of his duty to so use that which he controlled as not to injure another. The master is liable because he acts by his servant, and is, therefore, bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of the agency. Both are liable jointly, because from the relation of master and servant they are united or identified in the same tortious act resulting in the same injury.

Some of the cases, in discussing the liability of the servant to a third person, make a distinction between nonfeasance and misfeasance of the servant, but all agree that the servant is liable for his acts of misfeasance. Inasmuch as the acts of the servant in this case were clearly misfeasance, no occasion <sup>339</sup> arises here for noticing the distinction. Among the authorities that may be cited in support of the view that master and servant are jointly liable for the misfeasance of the servant acting within the scope of the agency, are *Cooley on Torts*, 142; *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; reaffirmed in *Phelps v. Wait*, 30 N. Y. 78; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, reported also in 48 Am. St. Rep. 911, and in 63 N. W. 93, where the cases pro and con are cited in the notes at page 441; *Winston v. Illinois Cent. R. R. Co.*, 23 Ky. Law Rep. 1283, 65 S. W. 13. Both in the motion for nonsuit and in the requests to charge, which were declined, appellants contended that the plaintiff having alleged a joint and concurrent tort of the defendants, the defendant, Southern Railway Company, has thereby been deprived of the right existing under other circumstances of removing this cause to the United States court, and therefore, to sustain the action, he must prove that the acts complained of were the joint and concurrent negligence of the defendant. This matter has already been disposed of by what has been said as to the joint liability of the defendants. We may add, however, that no question of the right of removal was involved in the case in any shape or form, and it would have been improper for the court or jury to have let such matter enter into their consideration. Even if there had been any claim of the right of removal on the ground that there was a separable controversy with a foreign corporation, it would have been properly denied: *Powers v. Chesapeake etc. R. R. Co.*, 169 U. S. 92, 18 Sup. Ct. Rep. 264; *Chesapeake etc. R. R. Co. v. Dixon*, 179

U. S. 131, 21 Sup. Ct. Rep. 67. The nonsuit was properly refused, and the requests to charge involving the question just discussed were properly denied.

3. It is excepted that the court erred in charging the jury as follows: "You are here as arbitrators to arbitrate the differences between these citizens of South Carolina." The error assigned being that jurors are not arbitrators but constitutional triers of issues of fact. We <sup>340</sup> fail to see any force in the objection. It is the duty of an arbitrator as well as a juror to investigate and determine the matter in controversy.

4. It is excepted that the court erred in charging the jury as follows: "Has he been damaged through the negligence of the defendant company—if so, what damages has he sustained?" The error assigned being: 1. That the issue was whether he had been injured by the joint and concurrent tort of both defendants; 2. That such charge eliminated the issue of the plaintiff's contributory negligence. This exception is without merit. The use of the singular "defendant" instead of the plural "defendants," was a mere harmless slip of the tongue, in view of the express instructions of the jury in other portions of the charge. Nor did the judge's charge eliminate the question of contributory negligence. One extract from the charge will dispose of both of these objections, as follows: "The jury will ascertain, first, has he been damaged through the negligence of the railroad and John Hutchison; and, if so, what injury has he sustained? Then you will inquire, did he contribute to the injury himself, because I charge you as a matter of law in the outset, that if the injury was the result of plaintiff's own want of care, proper care, that his want of due care contributed to his own injury, he could not complain of the defendant company nor of the defendant, Hutchison; in that event he would be said in law to have brought about his own injury, and he would be held responsible."

The exception assigning error in refusing defendants' ninth request to charge is based upon a misapprehension, as the case at folio 459 shows that such request to charge was not refused, but charged as requested.

There was no error in refusing defendant's fourteenth request to charge, which was as follows: "Plaintiff having alleged in paragraph 6 that owing to the distance between the engines when he first saw the branch engine and to the speed of his train and the air-brakes, he could <sup>341</sup> have prevented the collision but for the alleged failure of the air-brakes to work, he

cannot claim that the negligence alleged in paragraph 7 caused the collision." Whether the negligence alleged in the complaint caused the collision and injury was properly left to the jury for determination.

The judgment of the circuit court is affirmed.

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*The Subsequent Case* of Gardner v. Southern Ry. Co., 65 S. C. 341, 43 S. E. 816, was an action against such company and its engineer, Pearson, to recover for personal injury alleged to have been sustained by the plaintiff, Gardner, while engaged in loading a freight-car of the defendant company, and caused by a violent collision of defendant's locomotive engine, negligently operated by Pearson, with such freight-car. In deciding this case on appeal, the supreme court again affirmed the rule, on the authority of the principal case, that a master and servant are both jointly and severally liable for the willful tort, or for the negligence of the servant while acting for the master within the scope of his employment.

*That a Master and Servant* are both liable to a third person injured through the negligence of the servant while acting within the scope of his employment, see Gates v. Latta, 117 N. C. 189, 53 Am. St. Rep. 584, 23 S. E. 173. They may be joined in one action to recover compensation for injuries suffered from the same act of negligence: Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 48 Am. St. Rep. 91, 63 N. W. 93.

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## NORMAN v. SOUTHERN RAILWAY.

[65 S. C. 517, 44 S. E. 83.]

**APPELLATE PRACTICE.**—Exceptions which fail to point out any specific error are too general for consideration on appeal. (p. 811.)

**RAILROADS—Expulsion of Passenger—Damages—Question for Jury.**—Whether the act of a conductor in ejecting a passenger from his train is such as to entitle him to punitive damages is a question for the jury. (p. 812.)

**RAILROADS—Limitations on Tickets.**—A railroad passenger paying full fare for his ticket is not bound by limitations printed thereon, unless he has notice thereof and has assented thereto. (p. 813.)

C. P. Sanders, for the appellant.

McGowan & Gunter, for the appellee.

**518 GARY, J.** The facts, omitting the formal allegations, are thus set out in the complaint:



"2. That on the seventh day of January, 1897, the plaintiff <sup>519</sup> being then at Union, in the county of Union aforesaid, his place of residence, and desiring and intending to go to Spartanburg aforesaid on business, purchased from defendant one first-class passage from Union to Spartanburg, paying full fare for same, and receiving a first-class ticket therefor.

"3. That on said seventh day of January, 1899, the plaintiff boarded the train upon which he expected to travel, but just before its departure plaintiff was handed by the defendant's ticket agent, who was also the telegraph operator, a telegraphic dispatch directing plaintiff not to come to Spartanburg that day; and plaintiff thereupon, because of said dispatch, decided to remain at Union, and got off the train along with said agent; the plaintiff's change of purpose and his reason therefor was known to said agent, and plaintiff did not use, or attempt to use, said ticket that day.

"4. That on the eighth day of January, 1899, plaintiff again boarded defendant's train for Spartanburg, and when accosted by the conductor, tendered the ticket for passage to Spartanburg. That the conductor refused the ticket, telling the plaintiff he could not ride upon it, that such ticket was good only on the day of sale, and that he would have to pay fare or get off the train, which plaintiff declined to do.

"5. That at Pacolet station the conductor came to plaintiff, telling plaintiff that by order of the defendant's superintendent, the plaintiff must pay fare or leave the train; and plaintiff declined to leave, whereupon the conductor seized plaintiff and forcibly ejected him from the car; and plaintiff was compelled, in order to pursue his journey, to purchase and pay for a passage from said station to Spartanburg. And plaintiff was ejected from said car by order of said superintendent.

"6. That by reason of said wrongful conduct and force of defendant in ejecting the plaintiff, he was greatly distressed and disturbed in his mind and feelings and humiliated in spirit, and was held up and exposed to the gaze and contempt of strangers and passengers upon the car as a person <sup>520</sup> who was attempting to defraud the defendant company and cheat them out of a passage or fare.

"7. That the ticket purchased at Union and tendered for passage and refused, had printed upon its face the following among other words: 'Good for one first-class passage, unless otherwise notched, if used on or before midnight of date canceled by "L" punch in margin below, only on the trains stop-

ping at destination'; and the date of its sale, January 7, 1899, was stamped upon its back, and same date was canceled by 'L' punch in margin below; but the plaintiff avers that at the time of the purchase by him of said passage and receipt of said ticket, he was not aware that the ticket contained the printed words above set forth, or that there was any condition or limitation that the ticket was good only on the day as canceled by the punch, or good only on day of sale; and he was not aware of any rule or regulation of the defendant company that such ticket was good only on day of sale or as canceled, or that the ticket purchased by plaintiff was good only and must be used on the seventh day of January, 1899. And plaintiff avers that he had previously ridden upon defendant's trains on similar tickets on days subsequent to the day of sale.

"8. That by reason of the facts hereinabove alleged the plaintiff has suffered injury and damage to the amount of six hundred (\$600) dollars."

The jury rendered a verdict in favor of the plaintiff for two hundred dollars.

The first and second exceptions assign error on the part of his honor, the circuit judge, as follows: "1. In allowing the following questions to be asked the plaintiff, and in allowing him to answer the same: Q. Did you say anything to him with reference to the ticket as to why you got off? And also in allowing the plaintiff to detail a conversation had between himself and the telegraph operator on the day he purchased the ticket in question.

"2. In allowing the plaintiff in reply to testify as to facts **521** which he says occurred between himself and the conductor, which facts had already been testified to, the error being that the same was cumulative evidence."

While these exceptions were not formally abandoned, nevertheless, they were not discussed by the appellant's attorney. They, however, fail to point out any specific error, and are, therefore, too general for consideration.

The thirteenth exception is as follows: "13. Because his honor erred in refusing defendant's twelfth request: 'In this case only actual damages can be allowed, no vindictive or punitive damages can be recovered,' and in submitting to the jury the question of vindictive or punitive damages, it being respectfully submitted, that in this case there was a time limitation plainly printed upon the ticket, which his honor instructed the jury the defendant company had a right to make; and it being

an admitted fact that the time within which the ticket was to be used had expired, and the evidence showing that there was no unusual force, no insult, no willfulness or maliciousness on the part of the defendant company, but only an honest effort to enforce a reasonable rule of the company in a quiet and dignified way, his honor should have instructed the jury that this was not a case for vindictive or punitive damages."

By reference to the complaint, it will be seen that the allegations thereof are appropriate to an action for punitive damages. In the case of *Meyers v. Southern Ry. Co.*, 64 S. C. 514, 42 S. E. 598, Mr. Justice Jones says: "It was fairly left to the jury in other portions of the charge to determine whether defendant's agent was merely negligent in his conduct, or whether he was acting willfully or wantonly. If defendant's agent, conscious of plaintiff's right as passenger, nevertheless invaded that right by exacting and coercing an unlawful payment of money under threat of expulsion from the train, his conduct was willful or wanton, such as would subject defendant to exemplary damages." In the case of *Griffin v. Southern Ry. Co.*, 65 S. C. 122, 43 S. E. 445, the court uses this language: "It is frequently difficult to tell <sup>522</sup> whether an act of wrong is attributable to willfulness or mere inadvertence, which is the foundation of negligence; and whenever the facts are susceptible of more than one inference, it is peculiarly the province of the jury to determine such question: *Pickens v. South Carolina etc. R. R. Co.*, 54 S. C. 498, 32 S. E. 567. The fact that it is often hard to determine whether an act of wrong was the result of recklessness or inadvertence, was no doubt one of the reasons inducing the legislature to pass the act of 1898, hereinbefore mentioned." These cases are cited with approval in *Marsh v. Western Union Tel. Co.*, 65 S. C. 122, 43 S. E. 445. The presiding judge could not have decided that the plaintiff was not entitled to punitive damages in this case without invading the province of the jury.

All the other exceptions, in different forms, raise the question whether his honor, the circuit judge, erred in ruling that the plaintiff was not bound by the conditions printed upon the ticket unless he had actual notice thereof. The authorities upon this question are conflicting, and it has never been decided in this state. The principle is correctly stated in the case of *Louisville etc. R. R. Co. v. Turber*, 100 Tenn. 213, 47 S. W. 223, as follows: "While there may be some uncertainty and even conflict in the authorities, we are of the opinion that the

correct rule is that a person who purchases a general ticket, and pays the usual price therefor, is entitled to one passage, unlimited as to time upon any train which, under the proper and usual schedule of the road, stops at the point of the passenger's destination. If a ticket, limited or conditional, is sold to a passenger, it can only be done upon an express agreement with him, either oral or in writing, and either based upon a consideration or with the alternative presented to the passenger of a full and unlimited ticket." (Numerous authorities are cited to sustain this doctrine.) Continuing, the court says: "So, in *Michigan Cent. R. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 330, it is said: 'Nothing short of an express stipulation by parol or in writing will be permitted to discharge a carrier from the duties which the <sup>523</sup> law has annexed to his employment, and such agreement is not to be implied or inferred from a general notice to the public, limiting the obligation of the carrier, which may, or may not, be assented to': See, also, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by the passenger without more, are not sufficient to bind him to such limitation or condition, in the absence of notice to him of such condition or limitation, and his assent thereto, when he purchases his ticket. It cannot be presumed that every person buying a railroad ticket for ordinary and general use will in the hurry and bustle of travel stop to read and critically inspect his ticket. As a matter of fact, but little opportunity is afforded him to do so. He generally takes his place with the crowd at the ticket window and produces and hands over his money with a request for ticket to destination. His money is received. The ticket is procured and, after being stamped, is handed to him through the ticket window. He has no opportunity to see what is upon it, and he has no time in the rush to stop and read and consider what may be printed or stamped on its face or back; and when he has paid full fare, there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinary local tickets do not generally contain any terms of contract and are not intended to do so. They are mere tokens to the passenger and vouchers to the conductor, adopted for convenience to show that the passenger had paid his fare from one place to another, very much in the nature of baggage checks. The contract is, in fact, made when the



ticket is purchased, and if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. Nor will the posting of notices in the waiting-rooms, ticket offices and on the cars affect purchasers with notice in such cases. Passengers have but little time or opportunity to read such placards, and it would impose quite <sup>524</sup> a serious burden upon travel, that the public must read all these notices thus posted before taking passage on a train upon which they are willing to and do pay full fare: *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 545; *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 505, and note; *Ray on Passenger Carriers*, sec. 145; *Hutchison on Carriers*, secs. 246, 580, 581; 4 *Elliott on Railroads*, sec. 1593. This rule, which we consider to be settled by the weight of authority and by reason, by no means prevents a railroad company from selling special tickets for special trains, with limitations and conditions, such as excursion, round trip, commutation and mileage tickets, when the conditions and limitations are known to the purchaser, and assented to, orally or in writing, and he has paid for such ticket less than the usual fare. When tickets are sold at reduced rates, it has been very wisely said that the purchaser should, in view of such reduced fare or greater privileges, expect and look for some conditions, limitations and terms, different from those attaching to tickets generally, and be on his guard to be informed of them. But there is no such obligation upon the ordinary passenger, who pays the usual or full fare, and asks for no reduced rates or special privileges, and he has a right to expect an unlimited ticket." We have quoted at length from the foregoing case because its reasoning renders unnecessary the citation of other authorities.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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*The Question Involved in the Principal Case*, as to the effect of limitations in tickets for which full fare has been paid, is considered in the monographic note to *Walker v. Price*, 84 Am. St. Rep. 397-401.

CASES  
IN THE  
SUPREME COURT  
OF  
UTAH.

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KARREN v. KARREN.

[25 Utah, 87, 69 Pac. 465.]

**APPELLATE PRACTICE.**—When the Findings of Fact do not Support the Judgment, it must be reversed. (p. 817.)

**DIVORCE, Collusive and Fraudulent, When Will not be Relieved Against.**—When a divorce is obtained by collusion of the parties, or by the suppression of facts or false testimony, it will not be disturbed at the instance of one of the parties who are in *pari delicto*, especially when one of them has subsequently married. This rule applied where the consent of a wife to a divorce was secured by her husband's representing to her that its purpose was to obtain a conveyance from his father of land occupied by them as their homestead, and that he would afterward remarry her. (pp. 817, 818.)

**DIVORCE, Subsequent Changes in Respecting Children or the Disposition of Property.**—Under the statute of Utah, providing that subsequent changes may be made in a decree of divorce by a court in respect to the disposal of the children or the disposition of property, no such change can be made by an independent suit seeking relief, but must be applied for in the original section. (p. 820.)

Suit to set aside a decree of divorce obtained from the plaintiff by her husband. Both parties appealed.

George Q. Rich and J. Z. Stewart, Jr., for the appellant, Fred W. Karren.

N. Tanner, Jr., and James N. Kimball, for the appellant. Telitha Dean Karren.

90 BASKIN, J. The material allegations of the complaint are as follows: "That heretofore, to wit, on the seventeenth day of September, 1900, in this [first district] court, a decree

and judgment was entered in an action wherein said defendant was plaintiff, and this plaintiff was defendant, in terms dissolving the bonds of matrimony between this plaintiff and said defendant, and awarding said defendant the three children, issue of the marriage between plaintiff and defendant, viz.: . . . . And plaintiff further alleges that the summons in said action was never served upon her, and that she had no legal knowledge of the pendency of said action; that said judgment was rendered against her by default, and upon a complaint" which charged her (the defendant) with having been guilty of adultery. "And that, after the commission of the adultery complained of in the complaint (in said action for divorce), the said defendant forgave her, and lived with and cohabited with her as his wife, and so lived and cohabited with her during the pendency of the action aforesaid, and thereafter left her in possession and custody of their home and children while he went to fill a mission in the southern states. And she further alleges that the said defendant represented to her and told her that he was procuring said divorce because of the insistence of his parents, and that after said divorce was procured he would remarry her, and provide for her as he had hitherto done, and under no circumstances deprive her of the custody of the said children, or of the homestead on which they then resided. That, at the time of the bringing of said suit, the title to said homestead was in the father of said defendant, and he, the said father, refused to make a deed to the said defendant of said homestead unless he would procure a divorce from this plaintiff. That, relying upon said representations of said defendant, and to enable him to procure the said deed to said homestead, she neglected and failed to appear and defend said action for divorce. That, notwithstanding said representations, <sup>91</sup> the said defendant falsely and knowingly testified in court that he had not forgiven this plaintiff for her adultery, and falsely and knowingly obtained a decree awarding the custody of the said children to him, and falsely and knowingly testified in court that he had not lived or cohabited with this plaintiff after having knowledge of said adultery, and forcibly, and against her consent, took from her her children, and turned her out of her home, and left her without the means of support. That she is in indigent circumstances, and has no property or means with which to support herself or to pay the expenses of this action. That the defendant is a man of means amply able to pay the expenses of this action, and to support this plaintiff."

The prayer of the complaint was that the decree of divorce be set aside; that the custody of the children be awarded to the plaintiff; and that alimony and certain sums of money for attorneys' fees and her support during the pendency of the action be awarded to her. The representations and false testimony of the defendant set out in the complaint, and the allegation in respect to the service of the summons in the divorce suit, were denied by the answer. In the third finding of fact, the trial court found that the summons in the said divorce suit was duly served on the defendant in said action on the thirtieth day of July, 1900. Except in respect to the allegation relating to said summons, and the finding that the defendant herein, since the said decree of divorce, remarried on the third day of October, 1901, the other findings of fact are, in substance, the same as the aforesaid material allegations of the complaint. As conclusions of law from the findings of fact the trial court found: "1. That the plaintiff is not entitled to have the decree of divorce entered on the said seventeenth day of September, 1900, set aside, so far as it dissolves the bonds of matrimony between her and defendant; 2. That she is not entitled to recover attorney's fees or suit money in this action; 3. <sup>92</sup> That the plaintiff herein is entitled to have the said decree, so far as it awards the custody of the children aforesaid to the said defendant, opened up and set aside, and is entitled to be allowed to answer in said divorce suit, setting up her rights, if any she has, to the said children, and for alimony and a division of the defendant's property; 4. That the plaintiff is entitled to have judgment against the defendant for her costs in this action." A decree in accordance therewith was made and entered. From this decree, both parties have taken an appeal.

The plaintiff contends that under the findings of fact she is entitled to a decree setting aside the decree of divorce, and the defendant contends that under the findings of fact the plaintiff is not entitled to any relief whatever. The findings of fact must support the judgment (8 Ency. of Pl. & Pr. 943); and when it affirmatively appears that they fail to do so the judgment will be reversed on appeal: *Maynard v. Locomotive Engineers' etc. Assn.*, 14 Utah, 458, 47 Pac. 1030; *Walley v. Deseret Bank*, 14 Utah, 305, 47 Pac. 147.

From the findings, and the plaintiff's allegations that she, "relying upon the said representations of the defendant, and to enable him to procure a deed to said homestead, neglected and



failed to appear and defend said action for divorce," it is clear that she freely consented to the institution of the divorce suit, and that the decree of divorce was obtained by the collusive agreement of the parties. The plaintiff, when she gave her consent, must have known that the contemplated divorce could only be procured by a suppression of the facts and false testimony. It does not appear that she made any objections to the proceedings until after the defendant, more than one year after the divorce, had remarried. This suit was instituted thirteen months after the divorce. While a decree of divorce obtained by collusion of the parties, or by the suppression of the facts, or false testimony, is a fraud upon the court, and against public policy, it would be <sup>93</sup> more against public policy to disturb the decree at the instance of either of the parties who are in pari delicto, when, after the divorce, as in this case, one of the parties has remarried. "After a decree of divorce is rendered other marriages may be contracted and children born, and it is against public policy to vacate the decree, as such an order would render innocent parties guilty of bigamy, and their children illegitimate. Accordingly, the courts have sometimes refused to vacate decrees of divorce": 7 Ency. of Pl. & Pr. 138. But when the vacation of a decree of divorce, obtained by collusion, is sought by a willing participant in the fraud, the court, on the principle of the maxim, "*Ex dolo malo non oritur actio*," will refuse to disturb the decree, especially when the opposing party has remarried, and children have sprung from the second union: 2 Nelson on Divorce and Separation, sec. 1055; 2 Bishop on Marriage and Divorce, sec. 1548; Hubbard v. Hubbard, 19 Colo. 13, 34 Pac. 170; Simons v. Simons, 47 Mich. 253, 645, 10 N. W. 360; Orth v. Orth, 69 Mich. 158, 37 N. W. 67; Yorston v. Yorston, 32 N. J. Eq. 495; Nichols v. Nichols, 25 N. J. Eq. 60; Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454. In the latter case Shaw, C. J., said: "In using the term '*collusion*' in the present case, we presume the libellant does not mean to use it in its ordinary sense, as collusion between the parties to the former proceeding (on divorce), and so a fraud upon the law, because that would include herself as party to the fraud. As said by Willes, C. J., in Prudam v. Phillips, reported in a note to Hargrave's Law Tracts, 456, '*if both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment.*'" In the case of Hubbard v. Hubbard, 19 Colo. 13, 34 Pac. 170, the wife, who was the defendant in the divorce suit, after ser-

vice on her of the summons, was induced to abstain from interposing any defense by the promise of her husband to pay to her, as soon as the decree of divorce was signed, three thousand dollars, and to have certain lots in Denver deeded to her. Upon the <sup>94</sup> failure of the husband to keep his promise, the wife filed a petition, in which she set out the promise of her husband, and alleged that it was made by the plaintiff for the purpose of inducing her to abstain from offering any evidence or making any defense to the action, and without any intention of performing the same. The petition was demurred to on the following grounds: "1. That the petition does not state facts sufficient to entitle the defendant to maintain the same; 2. That it appears by the petition that the same is brought and presented by the defendant to set aside a decree of court obtained by consent, and in pursuance of a fraudulent and collusive purpose participated in by the defendant to deceive and defraud the court; 3. That it appears by the said petition that the same is presented for the purpose of enabling petitioner to take advantage of a certain corrupt, collusive, and illegal agreement therein set up." In the opinion of the court, sustaining the demurrer, Hayt, C. J., said: "It is apparent upon the face of the petition that plaintiff in error was in no way misled or deceived as to the nature of the original action. She was duly served with process of summons and a copy of the complaint, and had at her service able counsel to defend her interests. Thus advised and prepared, she entered into a secret, collusive agreement with defendant in error, and for a promised consideration aided him by her silence to impose upon the court and procure a divorce. After the entry of the decree thus obtained, she remained silent for more than one year, and only upon failure to realize the consideration promised for her shameless bargain did she apply for relief." In 2 Bishop on Marriage and Divorce, section 1548, the doctrine is clearly stated as follows: "Mutual fraud, of which the common instance is collusion, and which is available to third persons in interest, as we shall see in the next subtitle, cannot be brought forward by either of the parties against the other as ground for reversing any step in the cause, or vacating <sup>95</sup> the sentence. This doctrine is an inevitable result from the universal rule of our law that one in a court of justice cannot complain of his own wrong, or of another's wrong whereof he was a partaker. It would be a special novelty for a plaintiff to address the tribunal with, 'The defendant and I have been play-

ing a trick on this court, but I discover he has got the better of me, so please turn the tables on him.'” Also, in Broom’s Legal Maxims, 711, thus: “No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.” In the opinion delivered by Mr. Justice Miner, in the case of *Short v. Bullion-Beck etc.* Min. Co., 20 Utah, 20, 30, 57 Pac. 720, 722, it was said: “If the plaintiff requires any aid from the illegal transaction in order to enable him to sue his claim, he cannot enforce it. Where a contract grows immediately out of and is connected with an illegal or immoral act, it will not be enforced. The test to determine whether the action arises *ex turpi causa* is the plaintiff’s ability to establish his case without any aid from the illegal transactions. If his cause or right to recover depends upon a transaction which is *malum in se*, or prohibited by law, and which he must prove, in order to make out his case, he cannot recover.” Since the remarriage of the defendant his second wife has not borne any children, but it is conceded by counsel that she is enceinte.

Section 1212 of the Revised Statutes provides that subsequent changes may be made in a decree of divorce, by the court, in respect to the disposal of the children or the distribution of property. Such changes must be applied for, and can only be granted in the action in which the decree of divorce was granted. We think it is clear, both from the allegations of the complaint and the findings of fact, that the plaintiff is not entitled to any relief in this action.

The judgment of the lower court is reversed, with costs, and the action dismissed.

Miner, C. J., concurs.

Bartch, J., concurs in result.

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*Divorce.—Fraud* of one of the parties in obtaining a decree of divorce is a good ground for setting it aside; *State v. Watson*, 20 R. I. 354, 78 Am. St. Rep. 871, 39 Atl. 193; *Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460; *Brown v. Grove*, 116 Ind. 84, 9 Am. St. Rep. 823, 9 N. E. 823. But a decree of divorce obtained by the collusion of the parties does not seem subject to attack by either: See the monographic note to *Greene v. Greene*, 61 Am. Dec. 465. A party cannot be heard to impeach a judgment which he himself has procured to be entered in his own favor: *Starbuck v. Starbuck*, 173 N. Y. 503, 93 Am. St. Rep. 631, 66 N. E. 193.

## HILTON v. ROYLANCE.

[25 Utah, 129, 69 Pac. 660.]

**MARRIAGE** is but a status created by a contract. (p. 826.)

**MARRIAGE cannot be Dissolved by the Simple Consent or Agreement of the Parties.**—It is regulated and controlled and can be dissolved only through the sovereign power of the state. (p. 826.)

**MARRIAGE.**—Consent to Marriage may be given orally or in writing, or may be inferred from the acts of the parties or the ceremony performed. No particular form of words is necessary. If in language mutually understood, or by acts declaratory of intention, the parties accept each other as husband and wife, their marriage is consummated. (p. 827.)

**MARRIAGE.**—A Ceremony is not Essential to a marriage in the absence of a statute requiring it. (p. 827.)

**A MARRIAGE may be Implied by the Common Law** where the parties cohabit for a considerable time and hold each other out as husband and wife. (p. 827.)

**MARRIAGE.**—Cohabitation is not Essential to a valid marriage. (p. 827.)

**MARRIAGE.**—A Secret Reservation of One of the Parties not Known to the Other cannot avoid or render invalid a marriage celebrated by a properly authorized ceremony apparently with the consent of both parties. (p. 828.)

**MARRIAGE.**—The Sealing Ceremony of the Mormon Church, entered into before a proper official between members of that church competent to contract marriage, constituted a valid marriage, though the woman was then supposed to be on her deathbed, and they never subsequently cohabited as husband and wife. (pp. 831, 841.)

**EVIDENCE—History and Records.**—When the evidence of the meaning of the term “sealed,” or “sealing ordinance” is unsatisfactory, the works of history and church records and journals of the Mormon Church are admissible as evidence. (p. 831.)

**EVIDENCE—Judicial Notice of Creeds.**—The courts will take judicial notice of the creeds and general doctrine of the Mormon Church and of the principles of celestial marriage peculiar to that church. (p. 831.)

**MARRIAGE.**—The Sealing Ceremony of the Mormon Church Effects a Marriage for time and eternity, and not for eternity only. The relation established by it is not one which may begin after death. (pp. 832, 836.)

**A MORMON DIVORCE,** by which the parties to the marriage, with the consent of the church, agree to dissolve their marital relations is invalid, and so remains, though the parties to the marriage believe the divorce to be valid, and one of them subsequently becomes a party to another marriage ceremony. (p. 843.)

**MARRIAGE—Estoppel to Insist Upon.**—A woman who, mistakenly believing a Mormon Church divorce to be valid, contracts a second marriage, is not thereby estopped, on learning that her divorce is invalid, from asserting the first marriage and claiming her rights of the widow of her husband. (p. 844.)



Action by the plaintiff claiming to be the widow of John R. Park, deceased, to recover as such one-third of certain real property which he sold in his lifetime to the defendant, and for other relief. Decree in favor of the defendant and the plaintiff appealed.

N. V. Jones and Powers, Straup & Lippman, for the appellant.

Bennett, Sutherland, Van Cott & Allison, Pierce, Critchlow & Barrette, and Stewart & Stewart, for the respondent.

**132** BARTCH, J. The plaintiff brought this action as the surviving wife and widow of John R. Park, deceased, and claims that she, as such widow, is entitled to one-third of certain real estate which the deceased in his lifetime sold to the defendant, and to have the same partitioned and set apart to her as her separate property in fee simple. It is alleged in the complaint, among other things, that the plaintiff and John R. Park, now deceased, intermarried at Salt Lake City, Utah territory, on or about the first day of December, 1872, and were thereafter husband and wife, until the death of the decedent, which occurred at Salt Lake City about September 30, 1900; that the plaintiff is still the surviving wife and widow of the decedent, and is a resident of Utah; that the decedent in his lifetime was the owner of certain real estate described in the complaint, which he conveyed by deed to the defendant about August 7, 1900; that the plaintiff never in any manner conveyed or relinquished her rights in the said real estate, or any part thereof, and is now the owner of one-third in value of the property; and that the defendant entered into possession of the property under the deed, and has refused, and still refuses, upon demand made, to relinquish possession to plaintiff of her interest therein. The prayer is that the plaintiff be adjudged to be the surviving wife and widow of the deceased, and that one-third of the real estate be set apart to her as her separate property. The defendant, in her answer, admits the ownership and sale of the property by the decedent in his lifetime, **133** and her refusal to relinquish possession of any part thereof. She denies that the parties were married, and, further answering, alleges, inter alia, that about December 5, 1872, John R. Park and the plaintiff were "sealed," or went through a "sealing ceremony," whereby they agreed to be husband and wife after death; that the "sealing ceremony" was performed when the plaintiff was

on her supposed deathbed, and after John R. Park had been assured that she would die; that both parties were members of the Mormon Church; that it was a tenet of that church that a man and a woman might be sealed, so that they would be husband and wife after death (that is, in eternity), and that both parties believed in that tenet; that the sealing ceremony was performed, not as a marriage contract, but in pursuance of said tenet only; that thereafter, upon the plaintiff unexpectedly recovering, the parties lived separate and apart, and agreed to "dissolve all such relationship between them as husband and wife"; that John R. Park remained an unmarried man; that the plaintiff about 1873 married William Hilton, and they ever since have lived together as husband and wife, and have had born to them ten children; and after said agreement the plaintiff did not claim to be the legal wife of John R. Park until after his death.

It appears from the evidence that in 1872 the plaintiff, then Annie F. Armitage, nineteen years of age, met and was introduced to Dr. John R. Park, then an unmarried man of about forty years of age, a popular educator and resident of the territory of Utah. Dr. Park was a member of the Mormon Church, and Miss Armitage had also been converted to that faith. The meeting occurred on the steamship "Minnesota," at Liverpool, England, and on their voyage to America the parties continued their acquaintance, and traveled together to New York. Dr. Park was kind and attentive to the lady on the voyage, and on their arrival at New York continued to pay her attention. After remaining in New York several <sup>134</sup> days, Miss Armitage continued her journey to Utah and Dr. Park followed later, about October. After his arrival in Utah the doctor called frequently on the plaintiff and their relations became intimate. About the middle of November, while staying at the house of Emeline Free Young, the plaintiff was taken ill, and continued to grow worse until she was not expected to live, when Mrs. Young, according to plaintiff's testimony, advised her that it would be better, in the event of her death, to be married than single, and said to her that she felt sure that Dr. Park intended to make her his wife, and advised her to accept him. To this she finally consented, and Dr. Park was sent for, and on December 5, 1872, while thus on her sick bed, and not expected to live, she and Dr. John R. Park were, by mutual consent, sealed by Daniel H. Wells, a member of the "first presidency" of the Church of Jesus Christ of Latter-Day Saints, in the presence of

a number of witnesses, most of whom are now dead. Concerning the ceremony the plaintiff testified that Dr. Park and Mr. Wells who officiated, both came to the bedside, and that Mr. Wells then said, "Take her right hand in yours, Doctor; take Annie's right hand in yours, Doctor"; that Mr. Wells then said, "John R. Park, are you willing to take Annie F. Armitage as your lawful wedded wife?" to which the doctor said, "Yes"; that Mr. Wells then asked her a similar question (if she would take John R. Park to be her lawful husband), which she answered, "Yes"; and that Mr. Wells then, after saying something which she did not quite remember, said: "I now pronounce you husband and wife for time and all eternity." President Wells then issued a certificate of "sealing" to the parties, as follows: "John Rocky Park, born Tiffin, Seneca county, Ohio, 7 May, 1833. Annie Flora Armitage, born Nottingham, London, 19 February, 1853. The above parties were sealed by Prest. D. H. Wells in the presence of Emeline Free Young, at her residence in Salt Lake City, U. T., December 5, 1872. The lady being on her supposed deathbed. Daniel <sup>135</sup> H. Wells. S. L. City, U. T., December 5, 1872." Indorsed across the face of it: "Recorded in historian's office, journal of date, R. L. C." In answer to the question: "Now will you state the relative position that they occupied, one to the other, when the ceremony was performed?" the witness Mrs. Hannah C. Wells said: "Well, I couldn't tell you that. I couldn't tell you that. I only remember that there was a ceremony, and that they were married, but just their position I can't remember." Dr. Park did not consent to have the ceremony performed until the attending physician advised him that the patient had but a short time to live. This information was given the doctor outside the hearing of the plaintiff. Right after the ceremony, it appears, the parties were left alone together. The plaintiff, testifying, said she thought the doctor remained with her about an hour, and that she understood the marriage to take effect at once. Dr. Park continued thereafter to make frequent visits to her, while she was recovering from sickness, until about the month of February, when he ceased to visit her. She thereupon, on two different occasions, having met him in the street, insisted upon a divorce. The doctor agreed to arrange it for her, and about the 19th of March, 1873, appeared at the house where plaintiff was staying, when they mutually agreed upon and signed a document known as a "church divorce" which reads as follows: "Know all persons by these presents that we,

the undersigned, John R. Park and Annie, his wife, before her marriage to him Annie Armitage, do hereby mutually covenant, promise, and agree to dissolve all the relations which have hitherto existed between us as husband and wife, and to keep ourselves separate and apart from each other, from this time forth. In witness whereof, we have hereunto set our hands at Salt Lake City, U. T., this nineteenth day of March, A. D. 1873. John R. Park. Annie Flora Park. Signed in the presence of D. McKenzie, James Jack." In October, 1875, a marriage ceremony between plaintiff and <sup>136</sup> William Hilton was performed in accordance with the rites of the Mormon Church, which marriage was admitted to be valid, if the plaintiff was then capable of contracting that relation. Thereafter she lived with William Hilton as his wife, and a number of children have been born to them. The ceremony was also performed by Daniel H. Wells. The plaintiff thought her church divorce was valid until she noticed the decision of this court in the case of Norton v. Tufts. Dr. Park never married again. In his lifetime he owned the property in dispute, and conveyed it by deed to the defendant, but the plaintiff relinquished no rights therein which she may have acquired because of the marriage. At the trial the court decided that John R. Park and the plaintiff never became or were husband and wife, and that the plaintiff is neither the owner of, nor entitled to any part of, the premises in controversy. Thereupon this appeal was taken.

The principal question to be determined is, Were John R. Park and Annie F. Armitage lawfully married on December 5, 1872? The appellant insists that the ceremony was performed according to the rites of the Mormon Church, by a person authorized to perform it, that it was a legal marriage, and valid at common law; and that the court erred in finding that the parties never intermarried and were never husband and wife. The respondent contends that there never was a marriage in this case, because, as is insisted, there never was any consent to a marriage contract, and that the burden was upon the plaintiff to prove a marriage contract, which it is claimed she failed to do. It is insisted by the respondent that the "sealing ceremony" which was performed and is relied upon as constituting a marriage ceremony simply made the parties thereto husband and wife for eternity (that is, after death, but not for time or this world, nor for time and eternity), <sup>137</sup> and that Dr. Park consented to be sealed to the



plaintiff for eternity only. So far as appears from the record the sealing ceremony performed in this instance was, in substance, such as it was the custom to perform where members of the Mormon Church entered into matrimony. It is a ceremony peculiar to that church and its people, who constitute a large majority of the inhabitants of this commonwealth, and the importance of the main question herein presented, as affecting the marriage status and property rights in this state, must not be overlooked; for if, under the facts and circumstances disclosed in this record, there was no marriage, then it would seem impossible to conjecture how many of such sealing ceremonies, although performed by ordinance of the church, were, after all, mere nullities, creating no valid marital relations.

Marriage, strictly speaking, is not a mere civil contract, but a status created by contract: 1 Bishop on Marriage and Divorce, sec. 34. It is true, it is founded in consent of the parties, but the consent is the contract because of which the status is created. Marriage differs from ordinary contracts, in that it can only exist where one man and one woman are legally united for life, whereas ordinary civil contracts may exist between two or more of either or both sexes for any stipulated time. So the marriage relation differs from other contractual relations in that, when the status is once created, the state becomes an interested party, and thereafter the marriage, with the rights and duties assigned by the law of matrimony, is not subject, as to its continuance, dissolution, or effects, to the mere intention and pleasure of the contracting parties. The marriage, with its privileges, obligations, rights, and duties which are or may be assigned by the law of matrimony for the establishment of families, and the multiplication and education of human kind, continues during the life of the parties, and no dissolution of the status can be effected simply by the mutual consent or agreement of the <sup>138</sup> parties. It is regulated and controlled, and can be dissolved only through the sovereign power of the state, whenever justice to either or both parties or the welfare of the public demands it: 1 Bishop on Marriage and Divorce, secs. 11, 30. The doctrine of ethics and of social science is universally recognized as the foundation of the marriage law, and from time immemorial marriage has been, in every civilized country, recognized as the foundation of civilization and of the social system. Neither one of the parties to the marriage can there-

after commit a breach of any of the obligations or duties assumed without a violation of conscience as well as of law. In view of these things, how can it be said, as insisted for the respondent that the "marriage contract is on a level with other contracts"? It is apparent that many of the rules of law applicable to the marriage status differ widely in material respects from those applicable to mere civil contracts: Bishop on Marriage and Divorce, secs. 35, 36. That, under the law, consent is the essence of marriage, the same as of every other contract, is true, and it is also true that the law does not compel parties to assume the matrimonial state without their mutual consent; but such consent, which, as we have seen, constitutes the contract to marry, may be given in writing or verbally, or may be inferred from the acts of the parties or the ceremony performed. With reference to consent, in case of marriage, no particular form of words is necessary. If, in language mutually understood, or by acts declaratory of intention, the parties accept each other as husband and wife, the marriage is consummated. Nor, in the absence of a statutory requirement, is a ceremony indispensable to its validity: *Bissell v. Bissell*, 55 Barb. 325. At common law, where the parties cohabit together for a considerable length of time, and hold each other out as husband and wife, a marriage may be implied, though no ceremony was ever performed. Mr. Bishop, in his work on Marriage, Divorce, and Separation, in volume 1, section 77, says: "Because of the high favor <sup>139</sup> in which marriage is held by the law, we have transmitted to us the special maxim, '*Semper praesumitur pro matrimonio*' ('always presume marriage'). When a man and woman are living together as husband and wife, the law will hold them to be such, even against strong probabilities that they are not, or, when a ceremony of marriage is shown, there will be the like presumption that it is valid, unless some distinct and special fact clearly appears in the particular case to the contrary." So, where a marriage ceremony is performed according to the forms of a church or of a religious sect, consent of the parties and capacity to contract will be presumed.

Nor is cohabitation necessary to constitute a valid marriage. "*Consensus, non concubitus, facit matrimonium*," is a maxim of the common law, of the civil law, and equally of the ecclesiastical law. In *Fleming v. People*, 27 N. Y. 329, Mr. Chief Justice Denio said: "Prima facie the fact of a marriage celebrated according to the forms of a religious

denomination embraces the requisite assent of the married parties to take each other as husband and wife; and if the party whose interest it is to dispute the marriage is satisfied with a general statement of the ceremony, and will not inquire more particularly as to what took place, he cannot be permitted to deny the apparent effect of the evidence": 1 Blackstone's Commentaries, 433-435; 2 Kent's Commentaries, 87-89; Abbott's Trial Evidence, 102, 103; Bradner on Evidence, 397; 1 Bishop on Marriage and Divorce, sec. 383; 19 Am. & Eng. Ency. of Law, 2d ed., 1180-1182; *People v. Calder*, 30 Mich. 85; *Dickerson v. Brown*, 49 Miss. 357; *Wilkie v. Collins*, 48 Miss. 496; *Caujolle v. Ferrie*, 26 Barb. 177; *Jackson v. Winne*, 7 Wend. 47, 22 Am. Dec. 563; *Hulett v. Carey*, 66 Minn. 327. 61 Am. St. Rep. 419, 69 N. W. 31. While, however, present intention and mutual consent of the parties is necessary to constitute a valid marriage, still, where the marriage has been celebrated by a properly authorized ceremony, apparently with the assent of both parties, no secret reservation of <sup>140</sup> one of the parties, entertained at the time of the ceremony, unknown to the other party, can serve the party entertaining it to avoid the marriage, for this would be a fraud upon the innocent party, and the guilty one would be estopped to deny the marriage, or to take advantage of his or her own wrong. "One who causes the other to participate in what marriage alone justifies, under the pretense not incautiously believed, that he means marriage, is in fundamental justice estopped to set up his fraudulent intent in place of the one he held out to the other, who has acted thereon by doing what is in the highest degree injurious if there is no marriage": 1 Bishop on Marriage and Divorce, secs. 327, 334, 383; *Barnett v. Kimmell*, 35 Pa. St. 13.

Looking now, in the light of these principles, at the facts and circumstances disclosed by the evidence herein, what did the parties intend at the time the sealing ceremony was performed? Did they then mutually assent to and contract a marriage under the law, or was it to be simply a marriage for eternity, which the law does not recognize? The evidence clearly shows, and it is admitted, that a sealing ceremony was performed, and that both parties mutually consented to it. The proof likewise shows that the sealing ceremony, whether it was for time and eternity, or merely for eternity, as claimed by the respondent, was performed under an ordinance of the Mormon Church, by an official thereof

who was fully authorized to officiate on such occasions. Both parties were members of that church, and believed in its doctrines. From the testimony of the plaintiff, it appears that, both before and for some time after the performance of the ceremony, the relations of the parties were quite intimate; that on their voyage and at New York, Dr. Park was very attentive to her; that in Salt Lake City, and while on her bed of sickness, he visited her quite frequently; that she was assured by the witness, Mrs. Young, at whose house she lay sick, that the doctor wished to make her his wife, and was <sup>141</sup> advised to be sealed to him, being told that she might die, and that it would be better for her to be sealed to some good man, as it would make her position in the next world more exalted; that at the ceremony by the bedside they joined their right hands; that the officiating clergyman then asked the doctor whether he was willing to take her (the plaintiff) to be his "lawful wedded wife," and received an affirmative reply; that to a similar inquiry the plaintiff gave an affirmative answer; and that, after some further ceremony by the clergyman, they were pronounced husband and wife. It is true, several witnesses testified that at the time of the performance of the ceremony the plaintiff appeared to them as if she were unconscious, but the clearness with which she has described the details of the occurrence, many of them being fully corroborated by other witnesses and the surrounding circumstances shown by the testimony, impel the conclusion that the plaintiff was not only conscious, although very sick, but fully understood what was going on. It will be noticed, upon reference to the testimony, that the witness Mrs. H. C. Wells, who was present at the sealing ceremony, said: "I only remember that there was a ceremony, and that they were married." Upon the ceremony having been performed, the person officiating issued a certificate stating that the "parties were sealed," which certificate was recorded in the office of the church historian.

Without further reference to the evidence in detail, there can be no doubt that both parties intended to be "sealed," whatever that may include, and that they both mutually consented to the sealing ceremony. Whether sealing, as an ordinance of the church of which both the parties were members, embraces the marriage status, under the laws of matrimony, or whether it instituted simply a marriage, under the doctrines peculiar to that church for eternity, remains to be seen. The



respondent insists that the parties did not agree or consent to be husband and wife during their joint lives, but only to <sup>142</sup> be husband and wife after both were dead; and, if this be true, then the occurrence was simply something of which the law takes no cognizance, and by which neither one was legally bound. The parties, however, must be held to have consented to and intended whatever their language and acts fairly and legitimately indicate. The most important subject of inquiry on this branch of the case, therefore, is what was meant by the term "sealed," or "sealing ceremony." This point was made an issue in the pleadings, for the plaintiff alleged marriage, and the defendant denied marriage, but admitted that the parties were sealed in accordance with a tenet of the Mormon Church. The question then immediately arose as to whether or not such a sealing constituted a valid marriage. At the trial the testimony introduced to show the meaning of the term "sealed," or "sealing ceremony," was very meager and wholly unsatisfactory. It is true, several witnesses attempted to state what was meant by the word "sealing," and the respondent contends that their evidence preponderates to the effect that sealing did not mean marriage; but when it is considered that none of them were shown or appear to be qualified to speak upon the subject, and that not a single officer of the church who was qualified was put upon the stand, although the issue was raised affirmatively by the defense, the testimony in question can be regarded as of little, if of any, importance in the determination of what is the meaning of those terms. Counsel for the respondent refer to Webster's definition of the word "seal," as used in common parlance, but what light can Webster's definition throw upon this subject? Its ordinary use is easily comprehended, but here it has a particular meaning assigned to it by the Mormon Church, by the authority of which church the ceremony was performed, and the meaning of the term which was thus given to it by the church must determine the sense in which it was and is used in the performance of the sealing ordinance. The church, as an organized ecclesiastical body, had the right to declare <sup>143</sup> and adopt tenets, rules and ordinances, not inconsistent with or repugnant to the laws of the land, for its own governance and the guidance and conduct of its members; and the same are binding upon the members, and will be respected by the courts in passing upon questions relating to ecclesiastical affairs. When, therefore, the parties, in the present instance,

who are both members of that church, were sealed according to the tenet thereof, they became bound by the relations of husband and wife, under the law of matrimony, if, in accordance with the particular significance given to the word "sealed," the sealing included those relations. And if by the sealing ceremony, and assent thereto, a marriage was solemnized for time as well as for eternity, then the marriage is good, and must be respected by the civil courts, notwithstanding that part of the contract and ceremony which related to eternity, for that may be regarded as mere surplusage. In *Baxter v. McDonnell*, 155 N. Y. 83, 49 N. E. 667, which was an action by a priest against a bishop of the Holy Roman Catholic Church to recover an alleged sum due him as salary, it was said: "When an individual joins an incorporated club or legally organized body, with power to make laws and rules for its own government and for the regulation of the conduct of its members, the member becomes bound by those laws and rules; and a decision by the body or a duly constituted committee, proceeding according to judicial forms, touching his rights or relations as a member is binding upon the courts. . . . He can always insist, of course, that his civil or property rights as an individual or citizen shall be determined according to the law of the land; but his relations, rights and obligations arising from his position as a member of some religious body may be determined according to the laws and procedure enacted by that body for such purpose."

The proof as to the meaning of the term "sealed," or "Sealing ordinance," being unsatisfactory, the only other <sup>144</sup> source of information would seem to be works of history and church records and journals; but counsel for the respondent insist that such works should not be considered by this court. It seems that they were offered in evidence and excluded under section 3400 of the Revised Statutes. We are of the opinion that the works offered were admissible under that section of the statutes. As they were excluded, however, are we precluded from reference to them to ascertain the particular meaning or sense in which the Mormon Church used the term "sealed," or "sealing ceremony"? We think not. Courts will take judicial notice of matters of history, of the contents of the Bible, of the fact that there are various religious sects, of the creed and general doctrine of each sect, and hence will take notice of the creed and general doctrine of the Mormon Church, and of the principle of "celestial marriage," peculiar to the Mormon sect.

These are matters of general history, and may fairly be presumed to be subjects of common knowledge, of which the courts take notice without proof of the facts. In its general incidents, Christianity has been declared to be a part of the common law, and courts, of their own motion, will take notice of the law. We must assume knowledge by the courts not only of the revealed laws of God, but also of His natural laws, which have been demonstrated by science or admitted by experience. In *State v. District Board of School Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 20 Am. St. Rep. 41, 44 N. W. 967, the Supreme Court of Wisconsin said: "The courts will take judicial notice of the contents of the Bible, that the religious world is divided into numerous sects, and the general doctrines maintained by each sect; for these things pertain to general history, and may fairly be presumed to be subjects of common knowledge. Thus they will take cognizance, without averment of the facts that there are numerous religious sects called 'Christians,' respectively, maintaining different and conflicting <sup>145</sup> doctrines; that some of these believe the doctrine of predestination, while others do not; some, the doctrine of eternal punishment of the wicked, while others repudiate it; some, the doctrines of the apostolic succession and the authority of the priesthood, while others reject both; some, that the Holy Scriptures are the only sufficient rule of faith and practice, while others believe that the only safe guide to human thought, opinion, and action is the illuminating power of the divine spirit upon the humble and devout heart; . . . and, further, that the sect known as the 'Latter-Day Saints,' or 'Mormons,' while accepting the Bible, is reputed to believe the Book of Mormon, and the deliverances of its own alleged prophets, to be of equal authority therewith": 1 Wharton on Evidence, secs. 282-284, 328-330; Greenleaf on Evidence, secs. 5, 6, and notes.

Having thus determined that we can take judicial notice of the works of history and theology offered in evidence and rejected, it now behooves us to ascertain what the particular meaning of the word "sealed" is, according to historical and the theological authority of the Mormon Church, and also to ascertain whether a "sealing ceremony" performed as in the case at bar, under and by virtue of the authority of the church, effects a marriage for time and eternity, or merely for eternity, and whether such a ceremony is ever performed for eternity only. Counsel for the respondent insist

that, according to those theological authorities, this ceremony relates to eternity or the future life, and that the relations established by the sealing ordinance, may begin after death. Upon careful examination, we are of the opinion that this position is not sound. In 1 Whitney's History of Utah, page 212, speaking of the doctrine of celestial marriage, the author said: "It was to the Latter-Day Saints the key to the celestial kingdom, where according to their faith, family relationships formed on earth according to divine law will be perpetuated. Hence the revelation enjoining celestial marriage <sup>146</sup> was entitled, 'Revelation on the Eternity of the Marriage Covenant, Including Plurality of Wives.'" How can "family relationships" be formed on earth and "perpetuated" in the celestial kingdom if they are not to begin until both parties are dead? Evidently, the historian meant that a marriage by authority of the church was for both time and eternity. The revelation referred to relates to the eternity of the "marriage covenant," and doubtless refers to all marriages solemnized by authority of the church, whether monogamous or plural. This will more clearly appear from the revelation itself, paragraph 1 of which reads: "Verily, thus saith the Lord unto you, my servant Joseph, that inasmuch as you have inquired of my hand, to know and understand wherein I, the Lord, justified my servants Abraham, Isaac and Jacob; as also Moses, David and Solomon, my servants, as touching the principle and doctrine of their having many wives and concubines."

In this paragraph, as will be noticed, the doctrine of a plurality of wives is mentioned, and the word "wives" is used as a general term, and includes the first wife, as well as plural wives. Paragraph 4 states: "For behold! I reveal unto you a new and everlasting covenant; and if you abide not that covenant, then are ye damned; for no one can reject this covenant, and be permitted to enter into my glory."

Here notice of a new and everlasting covenant is given, and a penalty fixed for disobedience thereof. The penalty is that those who do not abide by the covenant will be "damned." The new covenant referred to is that of marriage, or "celestial marriage," as it has been characterized. Paragraph 7 reads: "And verily I say unto you, that the conditions of this law are these: All covenants, contracts, bonds, obligations, oaths, vows, performances, connections, associations, or expectations, <sup>147</sup> that are not made, and entered into, and sealed by the Holy Spirit of promise, of him who is anointed, both



as well for time and for all eternity, and that, too, most holy by revelation and commandment, through the medium of mine anointed, whom I have appointed on the earth to hold this power (and I have appointed unto my servant Joseph to hold this power in the last days, and there is never but one on the earth at a time, on whom this power and the keys of the priesthood are conferred) are of no efficacy, virtue or force, in and after the resurrection from the dead; for all contracts that are not made unto this end, have an end when men are dead."

Here is revealed how the new covenant shall be made and performed, by or through whom it must be performed or "sealed," and its duration. In this paragraph also appears the reason for sealing in marriage, which is that the family union, the relations of husband and wife, may continue in effect in the eternal world.

In paragraph 18 it is said: "And again, verily I say unto you, if a man marry a wife, and make a covenant with her for time and for all eternity, if that covenant is not by me, or by my word, which is my law, and is not sealed by the Holy Spirit of promise, through him whom I have anointed and appointed unto this power—then it is not valid, neither of force when they are out of the world, because they are not joined by me, saith the Lord, neither by my word."

This states, probably, more clearly, what is implied in paragraph 7, that a marriage by contract or covenant for time and eternity, not sealed by the Holy Spirit of promise, through the "anointed," is not valid, nor of force when the parties are out of the world.

In paragraph 19 occurs this language: "And again, verily I say unto you, if a man marry a wife by word, which is my law, and by the new and everlasting <sup>148</sup> covenant, and it is sealed unto them by the Holy Spirit of promise, by him who is anointed, unto whom I have appointed this power, and the keys of this priesthood; and it shall be said unto them, ye shall come forth in the first resurrection, and if it be after the first resurrection, in the next resurrection; and shall inherit thrones, kingdoms, principalities, and powers, dominions, all heights and depths—then shall it be written in the Lamb's Book of Life, that he shall commit no murder whereby to shed innocent blood."

Here it affirmatively appears that if a marriage is by the "new and everlasting covenant," and is sealed as provided in

the revealed law, it will be of force forever, and the promise is that the parties "shall come forth in the first resurrection," and "shall inherit thrones, kingdoms, principalities," etc., and shall be exalted and glorified in eternity. And in paragraph 61 the language is: "And again, as pertaining to the law of the priesthood: If any man espouse a virgin, and desire to espouse another, and the first give her consent; and if he espouses the second, and they are virgins, and have vowed to no other man, then is he justified; he cannot commit adultery, for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else."

As will be observed, this paragraph refers to plural marriages, and shows that they are justified by and are of force under the revelation, and that cohabitation, after sealing or marriage, is not considered adulterous.

The revelation, comprising sixty-six paragraphs, is found in section 132, Book of Doctrines and Covenants of the Mormon Church, and is entitled: "Revelation on the Eternity of the Marriage Covenant, Including Plurality of Wives. Given Through Joseph, the Seer," etc. And we have not been referred to, nor have our researches disclosed, any other law or regulation of the Mormon Church for the solemnization of marriages of its members. It must, therefore, be regarded <sup>149</sup> as the ecclesiastical law for contracting and solemnizing all marriages which are celebrated through the instrumentality of that church. The revelation made known the way and, so far as we have been able to ascertain, the only way, in which marriages can be contracted and solemnized among Latter-Day Saints, to be valid and of force in the hereafter. As will be noticed, it expressly declares that all such covenants, contracts, bonds, etc., "that are not made and entered into and sealed by the Holy Spirit of promise, for time and all eternity," through the medium of the "anointed" who is appointed on the earth to hold this power (and "there is never but one on the earth, at a time, on whom this power and the keys to this priesthood are conferred"), are of "no efficacy, virtue, or force" after the contracting parties are dead. The revelation is not that the covenant must be sealed merely for time, nor yet alone for eternity, but both "for time and for all eternity," in order to possess efficacy, virtue, and force after death. The penalty for disobedience, as to this injunction, is that the guilty parties shall be "damned." It is thus clear, according to the revealed law, that, to be sealed

was to be married for time and eternity, and that the sealing ceremony is a marriage ceremony, which is good at common law; the part referring to eternity, as we have seen, being regarded as simply surplusage. It seems also clear, upon careful scrutiny, that neither a sealing nor marriage for time, whereby the parties are to become husband and wife for this world only, nor a sealing or marriage for eternity, whereby the parties are not to become husband and wife until after death (that is, in the next world), was authorized by this revealed law; and hence any and all such unauthorized marriages would be a violation of the revelation, and would subject the contracting parties to the penalty provided as for disobedience, for the express revealed covenant is that sealing or marrying shall be for time and eternity.

**150** Now, the evidence in the case at bar discloses the fact that both parties to the sealing ceremony were members of the Mormon Church, and believed in its doctrines and tenets. We must therefore assume that, as viewed by them, the revelation was of divine origin, sacred and binding in conscience. Such being the case, and it being not only admitted, but urged, by the respondent, that the object of the sealing ceremony was to secure a more exalted position in eternity for the woman who was supposed then to be on her deathbed, would it be reasonable, under all these surrounding circumstances, to hold that the parties knowingly contracted and consented to a marriage condemned by the supreme law of the church which they revered, and which marriage, instead of exalting the woman, would subject both of them to punishment forever in the next world? In our judgment, no such result is indicated by the weight of the evidence; nor as we have seen, is it warranted because of the fact that the parties were simply sealed in accordance with a tenet of their church. Lest there might be some doubt, however, as to our interpretation of the revelation concerning celestial marriages, let us see how the authorities of the church interpreted the revealed law, and what meaning they attached to the terms "sealed" and "sealing ceremony." Speaking on the subject of marriage or sealing, Brigham Young, president of the Church of Jesus Christ of Latter-Day Saints, in February, 1868, among other things said: "The Lord says, 'Let my servants and handmaidens be sealed, and let their children be sealed.' This great and happy government under which we have lived so long says we shall not perform

the ordinance of sealing." On that occasion, he also said: "The ordinance of sealing must be performed here": 12 Jour. Disc. 164, 165. Upon the same subject, President Young, in a discourse delivered May 8, 1870, said: "I will say a few words on a subject which has been mentioned here; that is, celestial marriage. God has given a revelation to <sup>151</sup> seal for time and for eternity, just as he did in the days of old. In our own days he has commanded his people to receive the new and everlasting covenant, and he has said, 'If ye abide not that covenant then are ye damned.' We have received it": 14 Jour. Disc. 43. Again, speaking upon the same subject, in a discourse delivered August, 1873, President Young used the word "sealed" in the same sense as "marriage": 16 Jour. Disc. 166, 167. On another occasion, in a discourse, delivered June 28, 1874, President Young, speaking in relation to marriage and divorce said: "I say to my sisters in the kingdom, who are sealed to men, and who say, 'We do not want this man in eternity, if he is going to conduct himself there as he does here,' there is not the least danger in the world of your seeing him in eternity, or of his seeing you there, if he proves himself unworthy here. But if he honors his priesthood, and you are to blame and come short of doing your duty, and prove yourself unworthy of celestial glory, it will be left to him to do what he pleases with you. You will be very glad to get to him if you find the fault was in yourself and not in him. But if you are not at fault, be not troubled about being joined to him there, for no man will have the privilege of gathering his wives and children around him there unless he proves himself worthy of them." On the subject of divorcees, he said: "I tell the brethren and sisters when they come to me and want a bill of divorce, that I am ready to seal people and administer in the ordinances, and they are welcome to my services; but, when they undertake to break the commandments and tear to pieces the doings of the Lord, I make them give me something. I tell a man he has to give me ten dollars if he wants a divorcee. For what? My services? No; for his foolishness. If you want a bill of divorce, give me ten dollars, so that I can put it down in the book that such a man and such a woman have dissolved partnership. Do you think you have done so when you have obtained a bill <sup>152</sup> of divorce? No; nor ever can if you are faithful to the covenants you have made. It takes a higher power than a



bill of divorce to take a woman from a man who is a good man and honors his priesthood. It must be a man who possesses a higher power in the priesthood; or else the woman is bound to her husband, and will be forever and ever. You might as well ask me for a piece of blank paper for a divorce, as to have a little writing on it, saying, 'We mutually agree to dissolve partnership and keep ourselves apart from each other, etc. It is all nonsense and folly. There is no such thing in the ordinances of the house of God. You cannot find any such law. It is true, Jesus told the people that a man could put his wife away for fornication, but for nothing short of this': 17 Jour. Disc. 118, 119. Can it be doubted that President Young, in his use of the word "sealed," meant "married"? Unquestionably he referred to the marriage status, and used that word with reference to those who had assumed the relations of husband and wife. So, President Taylor, while yet an elder of the church, in preaching a funeral sermon, December 31, 1876, said: "We then come to the sealing power. Here, say, is a man and a woman who have been sealed together for time and eternity. Does it mean anything? If it means anything, which it certainly does, it means just what it says. If the husband of this our departed sister continues faithful to the end, maintains his integrity to God, and fights the good fight of faith, he will claim her in eternity, and they twain will be one flesh. This young man, some one will have to act for him over the marriage altar in having some one sealed to him": 18 Jour. Disc. 334. After he became president of the church, in a discourse speaking on the subject of celestial marriage, he said: "God has revealed, through his servant Joseph Smith, something more. . . . He has revealed unto us the law of celestial marriage, associated with which is the principle of plural marriage." And again he said: "It is <sup>153</sup> not enough for men to be married to wives and be sealed according to the order of God. They must treat them aright when they have them": 24 Jour. Disc. 229, 231. Likewise, President Wilford Woodruff, in a discourse delivered July 20, 1883, speaking on the same subject said: "So I will say to our friends here—the strangers within our gates—that any man that marries a wife by any authority other than the authority of the holy priesthood is simply married for time, 'or until death do you part.' When you go into the spirit world you have no claim on your wife and children.

The ordinance of having them sealed to you by one having authority of the holy priesthood must be attended to in this world. Father Abraham obeyed the law of the patriarchal order of marriage. His wives were sealed to him for time and all eternity and so were the wives of all the patriarchs and prophets that obeyed the law." Is it not manifest that these presidents of the church all used the word "sealed" in the same sense as "married"? So Elder Orson Pratt, well known for his ability in expounding the principles and doctrines of the Mormon Church, in a discourse delivered July 11, 1875, speaking on the subject of celestial marriage, said: "It seems, then, that if we wish to fulfill the object of our creation, and if we are truly in the Lord, we must go into the eternal world as married, not for time, not by some justice of the peace that is an infidel, not by a man that has no right to join us together under the revelation and authority of the Most High, but we must be married for eternity by a man who has the right to speak, being commanded of the Lord, holding the keys of authority and power, who can say to the man and woman, 'I pronounce you husband and wife for time and all eternity.' Then you will be married according to the pattern given. Then you will have a claim upon each other after death. But have married people, in the nations, a claim upon each other after death? I mean those who have not been married after the pattern and authority of Heaven. <sup>154</sup> By no means. Their contracts are made only for a little space—some twenty, thirty, fifty, or seventy years, as the case may be. Then death comes along, and the contract runs out; and when you come in the resurrection, who are you? Have you any wife there? Oh, no. Why not? Because you were not sealed or married to each other by Divine authority. That is the reason." Again he said: "The word of the Lord told you to gather up here. What for? That you might, among other things, be married according to the law of God. I am endeavoring to tell you some of our peculiarities. We do believe that every man who gathers up with the saints, whether married by the gentile law or not, should be married by one holding divine authority to officiate, and thus have the ordinance, the ministration, sealed on earth, that it may be sealed in the heavens": 18 Jour. Dis. 49-51. Likewise, in the Articles of Faith, page 457—a work written by Dr. James E. Talmage, by appointment, and published by the church—respecting celestial marriage it is said: "Mar-

riage, as regarded by the Latter-Day Saints, is ordained of God, and designed to be an eternal relationship of the sexes. With this people it is not merely a temporal contract to be of effect on earth during the mortal existence of the parties, but a solemn agreement which is to extend beyond the grave. In the complete ceremony of marriage, as prescribed by the church, the man and the woman are placed under covenant of mutual fidelity—not ‘until death do you part.’ but ‘for time and for all eternity.’ A contract as far-reaching as this, extending not only throughout time, but into the domain of the hereafter, requires for its validation an authority superior to that of earth; and such an authority is found in the holy priesthood, which, given of God, is eternal.” In the *Key to Theology*, by Parley P. Pratt (pages 162, 163), the doctrine is stated thus: “All vows, covenants, contracts, marriages, or unions not formed by revelation and sealed for time and all eternity, and recorded in the holy <sup>155</sup> archives of earth and Heaven by the ministration of the holy and eternal priesthood, will be dissolved by death, and will not be recognized by the eternal authorities after the parties have entered through the veil into the eternal world. This is Heaven’s eternal law, as revealed to the ancients of all ages, who held the keys of eternal priesthood, after the order of the Son of God, and as restored with the priesthood of the saints of this age.” In addition to the authorities already cited and quoted from, see 19 Jour. Disc. 163, 164; 21 Jour. Disc., 292-296; 23 Jour. Disc. 132; Robert’s Outlines Ecc. Hist. 426; Richards’ Compendium, 131-133; Historical Record (Ch. Enc.), 514, 529.

In the light of these authorities, can there be any doubt that in Mormon Church parlance “sealed” means the same thing as the word “married.” or that a “sealing ceremony” is with the Latter-Day Saints a “marriage ceremony”? Is it not apparent that by them these terms are used interchangeably and are synonymous? With them, whether the solemnization of the covenant of marriage be called a “sealing ceremony” or a “marriage ceremony,” it means the same. In either case it establishes the marriage status, and creates the relations of husband and wife. In either case, the contracting parties are bound for time and all eternity; and this, as is obvious from the authorities quoted and referred to, is the light in which a Mormon marriage was viewed by the presidents of the church, and is viewed by those speaking by authority. In the mind of a Mormon, when such a

marriage is celebrated, "the woman," as said by President Young, "is bound to the husband, and will be forever and ever." It is true that, when compared with a marriage solemnized outside the pale of the church, a sealing embraces more than such a marriage, in that it is for eternity as well as for time; but the effect of each is the same at common law, or the law of matrimony, at all events, in the absence of a statute prescribing a different ceremony. Singular and peculiar <sup>156</sup> as such a ceremony may seem, yet it is sufficient under the law, and evidently the Latter-Day Saints accept the doctrine as of divine origin and as a part of their religious faith; and when, as in the case at bar, the sealing ceremony has been performed with the mutual consent of the contracting parties, by one properly authorized to perform it, the marriage status is created, with all the marital rights and duties pertaining thereto by virtue of the laws of the land. Cohabitation may immediately follow as an incident to the marriage, but it is not compulsory; and the parties may cohabit or not, as they may mutually agree, without affecting their status. Seeing, thus, that the revelation concerning celestial marriages constitutes the only law on the subject of marriage in the Mormon Church; that such law provides but one form of marriage, the same being for time as well as for eternity; that, according to the interpretation of the church, "to be sealed" means "to be married," and a sealing ceremony is a marriage ceremony, and creates the relations of husband and wife; and that these things were so when the ceremony in the present case was performed—how can it be successfully or justly maintained that Dr. John R. Park, a known scholar, a man not only of honor, but of high intellectual attainments, himself an able interpreter of language, and a devout member of the church, consented simply to a sealing ceremony, to take effect in the world to come, but not in this world? If this were established would it not be a reflection upon his memory? Dr. Park, as a member of the church, must be presumed to have known what the laws and regulations of his church were, and what a sealing ceremony meant. Especially is this so as to a man of his attainments, and thus, if the contention of counsel for the respondent that the doctor did not intend to marry the plaintiff for time, but simply consented to be married or sealed for eternity, were true, it would show him to have been guilty of fraud and deceit, and of conduct wholly unjustifiable; for it is shown that at the time of the ceremony



**157** the bride was upon her supposed deathbed, and the purpose of the solemnization at that time was so that her position would be more exalted in the next world if she should die, and she had been so informed by a close friend; and assured that the doctor intended to make her his wife; and advised to accept him. Evidently the bride consented to the ceremony, believing it to be a marriage countenanced by the church of her faith. If, under these circumstances, the bridegroom, knowing that the marriage was then to be performed so that the bride's position would be more exalted in the hereafter, had consented only to a marriage, which, according to the revealed law of their church, and which he must be held to have understood, and doubtless did understand, instead of exalting her position, would, as we have seen, subject both of them to condemnation in the world to come, his conduct would be absolutely indefensible upon any principle of justice. The facts, however, both those appearing in evidence, and those of which we have a right to take notice without proof convince the mind that the bridegroom neither intended nor consented to a marriage condemned by the church, but that he understood it to be one authorized by it, and that it was for time and eternity. Without doubt, his motives were pure. The testimony respecting the conversation the doctor had outside of the sickroom, and without the hearing of the bride, concerning the seriousness of her condition, etc., questionable as its admission appears, establishes nothing to the contrary as to his motives, or as to his consenting to a lawful marriage, and we cannot accept the construction which counsel for the respondent have placed upon it. Very likely he would not have consented to the performance of the sealing ceremony at that time and place if he had not been advised that she could not recover, because he did not wish to take any advantage of her condition, and because of the fact that, under the regulations of the church, members were to be sealed in the endowment house. His anxiety and motives are explained by what took **158** place between him and the officiating clergyman at the beginning of the ceremony, when he was asked: "Are you ready, Doctor," and he answered, "Yes, Brother Wells, but I want it understood that I will take no advantage of this sick girl. If she was in health, I might be the last of her choice." This was the declaration of an honest and sincere man. It was testified to by the plaintiff, and is uncontradicted. So, the incident after the ceremony, respecting the intimations in his

presence that she might recover, might naturally have caused some annoyance, because upon regaining her health she might regret the marriage. But why annoyed, if, as is urged, there was simply a sealing for the next world? Does not that circumstance itself tend to show that the doctor all the while understood that the sealing ceremony was a lawful marriage? Aside from all these things, however, the church divorce, which was introduced in evidence, it would seem, shows beyond reasonable controversy that Dr. Park, as well as the plaintiff, regarded the transaction as a valid marriage; for therein, by their own language, and under their own signatures, they admitted not only that they were married and were bound by the relations of husband and wife, but promised and agreed to dissolve those relations, and to keep separate and apart from each other from that time forth. That to them was a solemn instrument, the same being recognized by the authority of the church, and shows the construction which the parties themselves placed upon the sealing ceremony, which was that they were married and bound as husband and wife. They having thus construed their own contract, this court has the right to adopt the same construction, it being also warranted by the facts.

It would seem useless to pursue this subject further. Its intricacies and importance, touching the validity of marriages in this state, and the resultant property rights, impelled us to bestow upon its consideration careful thought and research. As a result of our investigations, the conclusion <sup>159</sup> that the sealing ceremony performed in this case established the marriage status and created the relations of husband and wife is irresistible.

The marriage, then, having been lawfully created, was it in force at the time when the respondent purchased the property in dispute? This question must be answered in the affirmative, unless the marriage status had previously been lawfully dissolved. The only thing, so far as shown by the evidence, that had ever been done toward dissolving it, was the procuring of the church divorce, to which reference was hereinbefore made. That divorce, counsel for the respondent, themselves, admit to be null and void, because, while the church could solemnize a marriage, it had no power to dissolve it. Such was the decision of this court in *Newton v. Tufts*, 19 Utah, 470, 57 Pac. 409, where a like divorce granted by the same church was in question. Nor is there anything to show

that the marriage contract was ever dissolved previous to the death of the husband. The mere fact that both parties believed the church divorce to be valid, and that the plaintiff, so believing, thereafter became a party to another marriage ceremony, did not dissolve her former marriage. Such being the case, upon the death of Dr. Park she became his lawful widow, and entitled to her share in his estate as such widow.

Nor does the record show such laches on her part as to estop her from claiming such share. Nor, under the circumstances disclosed in the evidence, is she now estopped from asserting her marriage with Dr. John R. Park, or from denying the legality of her subsequent marriage.

We are of the opinion that the finding and holding of the court that the plaintiff and Dr. John R. Park were never married, and that she is entitled to no part of the estate of the deceased, are so manifestly erroneous that they cannot be upheld; and the case must, therefore, be reversed, with costs, and the cause remanded, with directions to the court below to set <sup>160</sup> aside its findings and decree, and enter new findings and decree in accordance herewith. It is so ordered.

Miner, C. J., and Baskin, J., concur.

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*Marriage may be Established* by proof of cohabitation, reputation, and the fact that the parties represented themselves as husband and wife: Chiles v. Drake, 2 Met. 146, 74 Am. Dec. 406; Williams v. Herriek, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036; Barker v. Valentine, 125 Mich. 336, 84 Am. St. Rep. 578, 84 N. W. 297. No particular form is required to constitute a contract of marriage; it is sufficient that the parties in some form declare that they take each other as husband and wife: State v. Zichfeld, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802. But a simple marriage ceremony does not make a man and woman husband and wife; capacity and consent are absolutely essential: Orchardson v. Cofield, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197. Nor is a ceremony or solemnization necessary to the validity of a marriage: Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Atlantic City R. R. Co. v. Goodin, 62 N. J. L. 394, 72 Am. St. Rep. 652, 42 Atl. 333; State v. Zichfeld, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802; unless so declared by statute: Norman v. Norman, 121 Cal. 620, 66 Am. St. Rep. 74, 54 Pac. 143. Coition and cohabitation are not necessary to consummate an otherwise valid marriage: Franklin v. Franklin, 154 Mass. 515, 26 Am. St. Rep. 266, 28 N. E. 681; note to Jackson v. Winne, 22 Am. Dec. 567. But see Kilburn v. Kilburn, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636.

## STATE v. SOPHER.

[25 Utah, 318, 71 Pac. 482.]

**SUNDAY LAWS.**—A law generally prohibiting the transaction of business on Sunday is constitutional. (p. 846.)

**SUNDAY LAWS Exempting Certain Businesses.**—A statute prohibiting the keeping open on Sunday of any place of business for the purpose of transacting business therein but exempting from its operation hotels, boarding-houses, baths, restaurants, livery-stables, and retail drugstores, for the legitimate business of each, and such manufacturing establishments as are usually kept in constant operation, is constitutional, and under it a barber may be convicted of keeping his shop open for business on Sunday. (p. 851.)

**SUNDAY LAWS—Acts of Necessity.**—The Keeping Open of a Barber-shop on Sunday and the shaving of a customer therein are not acts of necessity and hence may be prohibited by statute. (p. 852.)

**SUNDAY LAWS—Arbitrary Classification.**—The fact that a Sunday law exempts from its provisions hotels, boarding-houses, baths, restaurants, livery-stables, retail drugstores, and such manufacturing establishments as are usually kept in constant operation, does not show that an arbitrary classification has been adopted. (p. 852.)

**CONSTITUTIONAL LAW.**—The Presumptions are in Favor of the constitutionality of a statute, and, unless the courts can clearly see that the legislature has erred, the act must stand. (p. 852.)

Shepard & Shepard, for the appellant.

M. A. Breeden, attorney general, W. R. White, deputy attorney general, for the state.

**320 HART, D. J.** Defendant is charged with the offense of keeping open a place of business on Sunday. It is alleged that he did "willfully and unlawfully conduct and operate a barber-shop and keep the same open, and did then and there unlawfully conduct a general barber business therein." Defendant's demurrer to the complaint was overruled, and he was found guilty in the justice's court, and also in the district court, and fined in each court the sum of fifteen dollars.

From the agreed facts it appears that defendant is a barber by occupation, and that on Sunday, June 16, 1901, he was in a barber-shop in Salt Lake City, Utah, following his vocation as barber; that one J. H. Rothwell (who was a member of the Barbers' Union, which union was against Sunday labor), the complaining witness, came into said barber-shop, entering by the side door of the shop, and asked to be shaved; that defendant shaved the said Rothwell who paid said defendant on



said day the sum of twenty-five cents; that <sup>321</sup> said barber-shop was connected with the Albany Hotel in said city; and that the evidence fails to show that anyone else was shaved by defendant on said day. Defendant's motion in arrest of judgment and motion for new trial were overruled and defendant appeals to this court contending that the law under which this prosecution was conducted (Rev. Stats. 1898, secs. 4234, 4235) is unconstitutional and void for the following reasons: 1. As being an undue restraint of personal liberty, and deprives a person of life, liberty and property without due process of law; 2. It is special legislation, based upon an arbitrary classification; 3. The act complained of was an act of necessity, which is allowed to be performed on Sunday; 4. It is not a proper exercise of the police power of the state.

Section 4234 prohibits, in general, the keeping open on Sunday of any place of business for the purpose of transacting business therein, while section 4235 excepts from the preceding section hotels, boarding-houses, baths, restaurants, taverns, livery-stables, or retail drug stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in constant operation. The appellant does not contend that section 4234 would be unconstitutional if it stood alone, but that it is rendered so by the exceptions of the section which follows.

General laws prohibiting the transaction of business on the first day of the week, commonly called Sunday, are so uniformly upheld by the courts as a legitimate exercise of the police power of the state that it is unnecessary to cite or discuss authority in support thereof. It is only upon special statutes, or special exceptions to general so-called Sunday laws, that the constitutionality of such enactments is seriously <sup>322</sup> called in question: 24 Am. & Eng. Ency. of Law, 1st ed., 530.

In Cooley's Constitutional Limitations, 734, the author says on Sunday laws: "There can no longer be any question, if there ever was, that such laws may be supported as regulations of police." The dissenting opinion of Judge Field in *Ex parte Newman*, 9 Cal. 518, which afterward became the opinion of the court (*Ex parte Andrews*, 18 Cal. 678; *Ex parte Burke*, 59 Cal. 6, 43 Am. Rep. 231; *Ex parte Koser*, 60 Cal. 177), and which has been extensively quoted and followed by other courts, clearly and forcibly explains the grounds upon which such laws safely rest. At page 520 of his opinion, in defense of a Sunday law, it is said: "In its enactment the legislature

has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience and sustained by science. There is no nation, possessing any degree of civilization, where the rule is not observed, either from the sanctions of law or the sanctions of religion. This fact has not escaped the observation of men of science, and distinguished philosophers have not hesitated to pronounce the rule founded upon a law of our race." And again: "Labor is in a great degree dependent upon capital, and unless the exercise of the power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise. . . . The law steps in to restrain the power of capital. Its object is not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. Its aim is to prevent the physical and moral debility which springs from uninterrupted labor, and in this aspect it is a beneficent and 323 merciful law." The same authority quotes with approval the following from the supreme court of Pennsylvania (*Specht v. Commonwealth*, 8 Pa. St. 312, 49 Am. Dec. 518): "All agree that to the well-being of society periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed may enjoy a respite from labor at the same time. They may be established by common consent, or, as is conceded, the legislative power of the state may, without impropriety, interfere to fix the time of their stated return, and enforce obedience to the direction. When this happens some one day must be selected, and it has been said the round of the week presents none which, being preferred, might not be regarded as favoring some one of the numerous religious sects into which mankind are divided. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction. . . . It is still, essentially, but a civil regulation, made for the government of man as a member of society."

The necessity for Sunday laws is stated by Mr. Tiedeman as follows: "If the law did not interfere, the feverish, intense desire to acquire wealth, so thoroughly a characteristic of the American nation, would ultimately prevent, not only the wage-earner, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instincts of self-preservation, by resting periodically from labor, even if the mad pursuit of wealth should not warp their judgment and destroy this instinct. Remove the prohibition, and this wholesome sanitary regulation would cease to be observed": Tiedeman on Limitations, 181.

It is true there are some cases holding unconstitutional, for various reasons, special Sunday laws directed against some particular vocation, such as barbering; but the decisions upon such statutes are not uniform. For instance, California, <sup>324</sup> while strongly upholding a general law prohibiting the transaction of general business on Sunday (Ex parte Andrews, 18 Cal. 678; Ex parte Burke, 59 Cal. 6, 43 Am. Rep. 231; Ex parte Koser, 60 Cal. 177), has held unconstitutional a law directed against the open barber-shop on Sunday: Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803. This case is also followed in *City of Tacoma v. Krech*, 15 Wash. 296, 46 Pac. 255, involving the validity of an ordinance of the plaintiff city prohibiting barbering on Sunday "while other laboring people in different characters of employment are allowed to prosecute their work."

Illinois and Missouri have each held a special law against Sunday barbering to be unconstitutional, there being at the time in Illinois a general law making unlawful "whatever disturbs the peace and good order of society by labor (works of necessity and charity excepted)," and in Missouri a general law broad enough to include barbering, and also a constitutional provision enacting that "where a general law can be made applicable, no local or special law shall be enacted": *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365, 43 N. E. 1108; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784. It may be noted in this connection that Illinois has held invalid a statute enacting that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week (*Ritchie v. People*, 155 Ill. 101, 46 Am. St. Rep. 315, 40 N. E. 454), in marked contrast to the decision of this court in sustaining an eight-hour law: *State v. Holden*, 14 Utah, 71, 46 Pac. 756; *Holden v. Hardy*, 169 U. S. 366,

18 Sup. Ct. Rep. 383. Again, the general Sunday law of Illinois, above referred to, was so construed as to permit other business of a general nature to be transacted on the Sabbath. And so it was forcibly argued in the Eden case that "if the merchant, grocer, the butcher and druggist, and other trades and callings, are allowed to open their place of business and carry <sup>325</sup> on their respective vocations during seven days of the week, upon what principle can it be that a person who may be engaged in the business of barbering may not do the same thing?" The case of *Ragio v. State*, 86 Tenn. 227, 6 S. W. 401, cited by appellant, cannot be considered as lending much support to this contention, as the law passed upon in that case was so framed as to permit a hotel-keeper, or anyone else except a barber, to keep open a bathroom on Sunday. Besides, the act legislated upon two subjects, contrary to the state constitution.

But special laws directed exclusively against Sunday barbering and other vocations, and other Sunday laws with broader exceptions than in our own statute, have been strongly upheld by the greater number of the states and by the supreme court of the United States. Thus, the case of *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707, 43 N. E. 541, goes to the extreme of sustaining a law against Sunday barbering, with an exception in favor of barbering in the city of New York and the village of Saratoga Springs until the hour of 1 o'clock on Sunday afternoon. The decision collects many cases upholding laws which to some extent interfere with property and liberty, and the limitation is held to be "that the real object of the statute must appear upon the inspection to have a reasonable connection with the welfare of the public," and the conclusion is reached that "when thus exercised, even if the effect is to interfere to some extent with the use of property or the prosecution of a lawful pursuit, it is not regarded as an appropriation of property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare so essential to organized society of necessity involve some sacrifice of natural rights." In the same case it is said: "According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference with business."



**326** Michigan also holds valid a special law against Sunday barbering, with an exception in favor of those who observe the seventh day of the week as a day of rest: *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589, 57 N. W. 1094.

The ordinance approved in *Lieberman v. State*, 26 Neb. 464, 18 Am. St. Rep. 791, 42 N. W. 419, excepts many more vocations from the general prohibition of Sunday labor than does our Utah statute. Bathrooms, under that ordinance, may be kept open on Sunday until 12 o'clock noon.

That Sunday labor is constitutionally punishable under general and special Sunday laws, see *Nesbit v. State* (Kan. App.), 54 Pac. 326; *Commonwealth v. Dextra*, 143 Mass. 28, 8 N. E. 756; *Commonwealth v. Waldman*, 140 Pa. St. 89, 21 Atl. 248; *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555; *Breyer v. State*, 102 Tenn. 103, 50 S. W. 769.

The Minnesota statute prohibits on Sunday all labor except works of necessity or charity, and declares that keeping open a barber-shop shall not be deemed a work of necessity or charity. The law is held to be constitutional in the case of *State v. Petit*, 74 Minn. 376, 77 N. W. 225, confirmed in *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. Rep. 666. In the latter case the supreme court of the United States quoted with approval the following language from the Minnesota decision: "Courts will take judicial notice of the fact that, in view of the custom to keep barber-shops open in the evening as well as in the day, the employés in them work more, and during later hours, than those engaged in most occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were permitted to be kept open on Sunday, the employés would ordinarily be deprived of rest during half that day. In view of all these facts, we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as **327** a matter of law, keeping barber-shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor, they have left that question to be determined as one of fact."

In *State v. Powell*, 58 Ohio St. 324, 50 N. E. 900, the court, in upholding a Sunday law as against baseball playing, remarked: "Liberty, as understood in this country, is not license, but liberty regulated by law. The personal liberty of every man is subject to such reasonable regulations as in the wisdom of the legislature are regarded as necessary to promote,

not only the peace and good order of society, but its well-being."

Likewise, in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, involving the validity of an ordinance of San Francisco prohibiting the carrying on of public laundries and wash-houses within certain prescribed limits of that city, Judge Field, for the court, said: "But neither the amendment [fourteenth], broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. . . . Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment."

And in *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, involving a similar ordinance, the same judge said, in addition to the language quoted in *State v. Holden*, 14 Utah, 17, 46 Pac. 756: "All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws. . . . How many hours shall constitute <sup>328</sup> a day's work in the absence of contract, at what time shops in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

Many other authorities bearing on the questions raised in the case at bar are cited and reviewed in the decisions herein referred to. In view of the consideration and discussion of similar questions in *State v. Holden*, 14 Utah, 71, 46 Pac. 756, we do not deem it necessary to more particularly consider the objections of appellant that the law in question is an undue restraint of personal liberty, and deprives a person of liberty, life, or property without due process of law, or that the same is not a proper exercise of the police power of the state. Upon the authority of that opinion, and of the cases therein and herein referred to, we are prepared to hold that said sec-

tions of our code taken together are not unconstitutional upon the foregoing grounds, nor for any other reason assigned.

Whether the question be considered one of law or a conclusion of fact, we are of opinion that the act complained of was not an act of necessity. While shaving may be regarded as an act of personal cleanliness, desirable to be performed upon the first day as well as upon other days of the week, still the statute does not prohibit a man from shaving himself or from being shaved by his servant or valet. The statute is directed simply against the keeping open of a shop or place or business for the purpose of transacting business therein upon Sunday.

Neither can the court say that the classification of the statute is arbitrary. The exception permitting baths to be kept open on Sunday approaches nearest to the act here complained of; but the court is unable to say that there is such similarity between keeping open a bath-house <sup>329</sup> and a barber-shop that it was not within the province of the legislature to make a distinction between the two. Upon reflection, many points of difference in the manner in which each is conducted in this community are readily suggested. The court may not rightly assert a wisdom it would deny to the co-ordinate branch of government (the legislature), and interfere with the discretion of that department of government. All presumptions are in favor of the validity of a statute, and unless the courts can clearly say that the legislature has erred the act should stand, and the prerogatives of the legislature not encroached upon. Courts may interpret, construe, declare, and apply the law, but may not usurp the functions of the law-making power by assuming to interfere with or control the legislative discretion. We cannot say that the law in question is not adapted in a reasonable degree to promote the health, comfort, safety or well-being of society.

It is therefore ordered that the judgment of the lower court be affirmed.

Baskin, C. J., and Bartch, J., concur.

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*The Constitutionality of Sunday Laws*, in discriminating against certain occupations and businesses, is considered in the monographic note to *Booth v. People*, 78 Am. St. Rep. 264-266.

## IN RE RICHARD FLINT.

[25 Utah, 338, 71 Pac. 531.]

**CRIMINAL LAW—Indefinite Suspension of Sentence.**—If a court, when a defendant appears before it for sentence, enters an order declaring that the sentence be, and the same is, hereby, suspended, and the defendant permitted to go upon his own recognizance, it loses jurisdiction over him, and all subsequent proceedings by it are unauthorized and void. (p. 855.)

John E. Bagley, for the petitioner.

M. A. Breeden, attorney general, and W. R. White, deputy attorney general, for the state.

**339** McCARTY, J. On the twenty-fifth day of February, 1902, the defendant in this case was duly convicted in the second judicial district court of this state of the crime of forgery. The court made an order directing the defendant to appear March 5, 1902, for sentence. The case was again continued, and March 12, 1902, was fixed as the time for pronouncing judgment. The defendant appeared for sentence on the last-mentioned date, and the court on its own motion, made and entered the following order: "The defendant having been convicted of the crime of forgery, and being now before the court to receive sentence, and the court being sufficiently advised, it is ordered that sentence be, and the same is hereby, suspended, and the defendant permitted to go upon his own recognizance." The defendant, by this order, was, in effect, discharged from custody. On the fifth day of December, 1902, the judge before whom the defendant was tried and convicted made and entered the following order in the case: "On motion of A. B. Hayes, Esq., district attorney, it is ordered that said defendant appear before the court for sentence on Monday, January 5, 1903." On January 5, 1903, the time for fixing sentence was continued until January 12, 1903, on which date the defendant appeared in court, and duly objected to any further proceedings in the premises on the ground that the court had no jurisdiction of the person of the defendant. The court overruled the objection, and sentenced the defendant to the state prison for a term of one year, and made an order duly committing him to the proper officers, with directions that the judgment be enforced. The defendant filed his petition in this court for a writ of habeas corpus, setting forth the



foregoing facts. The writ was duly issued, served, and return made to this court.

<sup>340</sup> Section 4905 of the Revised Statutes of 1898, so far as material to this case, reads as follows: "After a . . . verdict of guilty, . . . if the judgment is not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which must be at least two days after the verdict, if the court intends to remain in session so long; or if not, as remote a time as can reasonably be allowed." Section 4913 provides: "When the defendant shall appear for judgment, he must be informed by the court, or by the clerk under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." Section 4915 is as follows: "If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered." The record shows that the proceedings in the case up to the time fixed for passing sentence were regular, and the foregoing provisions of the statute complied with. Therefore the only question for this court to determine is, Did the court, by indefinitely suspending the sentence, lose jurisdiction of the person of the defendant, or did it still retain jurisdiction, with legal power and authority to sentence him to the state prison eleven months after he had been discharged from custody? Under the foregoing provisions of the statute, a trial court undoubtedly has the authority to postpone sentence from time to time for a proper purpose, such as to inform itself of the circumstances surrounding the commission of the crime for which the defendant stands convicted, and thereby determine what penalty, under the facts of the particular case, ought to be imposed, and also to enable the defendant to make the necessary preparations to move for an arrest of judgment or for a new trial. In fact, there are many exigencies that could arise which might, in the  
<sup>341</sup> interests of justice, require a postponement of the time for sentence beyond that first fixed by the court. In such cases the court may, in order to protect the interests of the state, and give the defendant ample time and opportunity to avail himself of every safeguard guaranteed him by law, suspend sentence from one designated time to another. But we know of no rule or principle of law whereby a court can indefinitely suspend sentence, keep the defendant in a state of suspense and uncertainty, and, long after he has been discharged from

custody, have him rearrested, and impose a sentence of either fine or imprisonment on him. A suspension of sentence for an indefinite period is, in effect, an exercise of the functions of the pardoning power, which belongs exclusively to the board of pardons—a separate and distinct department of the state government, and in no way connected with the trial courts: See Const., art. 7, sec. 12; *People v. Blackburn*, 6 Utah, 347, 348, 23 Pac. 759. When the court suspended judgment indefinitely, and ordered the defendant discharged from custody, it no longer had jurisdiction over him, and all subsequent proceedings in the premises were unauthorized by law, and are therefore void: *In re Strickler*, 51 Kan. 700, 33 Pac. 620; *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318; *United States v. Wilson (C. C.)*, 46 Fed. 748; *People v. Allen*, 155 Ill. 61, 39 N. E. 568; *Weaver v. People*, 33 Mich. 296; *People v. Morrisette*, 20 How. Pr. 118. The case of *People v. Blackburn*, 6 Utah, 347, 23 Pac. 759, cited and relied upon by the attorney general in support of his contention that the proceedings of the trial court were regular and should be upheld, supports the foregoing conclusions. In that case the court says: "After conviction the trial court may, undoubtedly, suspend judgment temporarily, for stated periods, from time to time. It may be proper to do so to allow the defendant time to move for a new trial, to perfect an appeal, to present a petition for pardon, and to allow the court time to consider and determine the sentence to be imposed. But when a defendant <sup>342</sup> stands convicted and all the remedies provided by law for testing the correctness of the conviction have been exhausted or waived, we have no doubt it is the duty of the court to keep control of the case, and within a reasonable time to proceed to give judgment, and in doing so exercise such discretion as the statute governing the particular offense commits to the courts."

The conclusion is irresistible that the commitment by which the defendant is restrained of his liberty is illegal. It is ordered that he be discharged.

Baskin, C. J., and Bartch, J., concur.

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*A Court may Delay Pronouncing Judgment* in a criminal case for a reasonable time to hear and determine a motion for a new trial or in arrest of judgment, or for other proper purposes, but it cannot indefinitely suspend judgment and sentence and allow the defendant to go upon his own recognizance: *People v. Barrett*, 202 Ill. 287, ante, p. 230, 67 N. E. 23.

## DESERET NATIONAL BANK v. KIDMAN.

[25 Utah, 379, 71 Pac. 873.]

**CONVEYANCES—Acknowledgment—Evidence of Identity.—**

The law does not permit an officer to take the acknowledgment of a stranger without satisfactory proof of his identity, and it is presumed that the officer performed his duty. (p. 861.)

**CONVEYANCES—Acknowledgment—Construction of.—Only a Substantial, and not a Strict, Compliance** with the forms set out in the statute for certifying acknowledgments is required, and every such certificate must be liberally construed. (p. 861.)

**CONVEYANCES—Acknowledgment, Form of.—**The certificate of the acknowledgment of a mortgage is sufficient if it shows the identity of the mortgagor and the fact of his acknowledgment. (p. 863.)

**CONVEYANCE—Acknowledgment—Omission of the Words “Personally Known to Me.”—**A certificate as follows: “Personally appeared before me E. A. P., the signer of the above instrument, who duly acknowledged to me that he executed the same,” sufficiently affirms the identity of the person making the acknowledgment, and is not void for omitting the words “personally known to me.” (p. 863.)

**CHATTEL MORTGAGES.—The Acknowledgment and Affidavit Annexed to a Chattel Mortgage May be Read Together** for the purpose of showing that the party signing the mortgage is the same person who acknowledged its execution. (p. 864.)

**CHATTEL MORTGAGE—Affidavit Omitting the Word “Defraud.”—**Though the statute requires a mortgage to be accompanied by an affidavit that it is made in good faith and without any design to hinder, delay, or defraud creditors, an affidavit declaring that the mortgage is made in good faith to secure the amount and debt therein specified, and without any design to hinder or delay the creditors of the mortgagor is sufficient. (p. 866.)

**A CHATTEL MORTGAGE is Good Against the Mortgagor,** though not in the form, nor accompanied by the affidavit, required by the statute and not filed for record. (p. 867.)

**VENDOR AND PURCHASER—Pleading Good Faith.—**A purchase of property in good faith and for value is not available as against a mortgage valid as against the mortgagor unless pleaded. (p. 867.)

**VENDOR AND PURCHASER—Burden of Proof.—**One claiming an exemption from a mortgage on the ground that he was a purchaser in good faith, for value, and without notice thereof, must assume the burden of proof. (p. 867.)

**REPLEVIN—Answer—Bona Fide Purchaser.—**Where the defendant claims the right to hold the property as against a mortgage, on the ground that he is a purchaser in good faith, for value, and without notice, his answer must affirmatively allege these facts. (p. 867.)

Young & Moyle, for the appellant.

George Q. Rich and Frank K. Nebeker, for the respondents.

**381** BASKIN, C. J. This is an action of replevin. The answer denies the plaintiff's alleged right to the possession of about seven hundred head of sheep claimed from defendants, and alleges that the defendants are the owners of, and entitled to the possession of, the same. A jury being impaneled in the case, the plaintiff placed Orson Rumel upon the witness-stand, and he testified as follows: "I know the signature of Earnest A. Purnell. Have seen him write his name several times. I saw him write his name to the promissory note." And after identifying the note as the one set out in the mortgage, he further testified "that at the time Mr. Purnell signed said note he signed what purported to be a chattel mortgage. The chattel mortgage was given to secure the above-mentioned note, and Mr. Purnell received two thousand four hundred dollars on the note and mortgage. No payments have been made by Mr. Purnell thereon, either principal or interest, excepting two interest payments. Mr. Purnell is still owing the bank the note. I witnessed the signature of Mr. Purnell to the mortgage, and after it was signed, acknowledged, and sworn to, and the notary's signature and seal to the affidavits attached, I took it myself and mailed it, addressed to the county recorder of Oneida county, state of Idaho." No objection was interposed by the defendants to this testimony.

The plaintiff then offered in evidence a chattel mortgage of a lot of sheep, in which were included the seven hundred in dispute, executed by one Earnest Purnell, of Cache county, Utah, in favor of the plaintiff, to secure a note for two thousand four hundred dollars, dated at Salt Lake City, September 5, 1900, and payable one year after date, with interest at the rate of eight per cent per annum. The sheep at the time said mortgage was executed were on the range in Oneida county, state of Idaho. Among other stipulations, the mortgage contained the following: "It is further agreed and stipulated that if said mortgagor shall fail to make any payment, as in said promissory note provided, or in case said mortgagee shall at any time deem its debt insecure, **382** the said mortgagee, or its assigns, may, in its option, declare the principal of said debt to be due, and may take possession of said mortgaged property wherever located, together with the increase thereon, if any, using all necessary force for that purpose."

Attached to the mortgage were the following affidavit and certificates of acknowledgment and recordation of mortgage:



"State of Utah,  
County of Salt Lake. } ss.

"Earnest A. Purnell, the mortgagor, H. S. Young, the cashier and agent for the mortgagee, named in the foregoing mortgage, being duly sworn, severally declare, each on oath, that this chattel mortgage is made in good faith to secure the amount and debt therein specified, and without any design to hinder or delay the creditors of said mortgagor.

"EARNEST A. PURNELL.

"H. S. YOUNG.

"Subscribed and sworn to before me a notary public in and for said county at Salt Lake City, Utah, this 5th day of September, A. D. 1900.

"HYRUM J. YOUNG. [Seal]

"United States of America,  
State of Utah,  
County of Salt Lake. } ss.

"On this fifth day of September, 1900, personally appeared before me Earnest A. Purnell, the signer of the above instrument, who duly acknowledged to me that he executed the same.

"HYRUM J. YOUNG, N. P.

"My commission expires November 24, 1900."

Indorsed: "Chattel Mortgage No. 480. Recorded at the request of H. S. Young, September 8, A. D. 1900, at 5 minutes past 9 A. M., in book B, Chattel Mortgages, page 123. D. J. Reynolds, recorder."

"State of Idaho, }  
County of Oneida. } ss.

"I, D. J. Reynolds, recorder of Oneida county, Idaho, do hereby certify the above and foregoing to be a full, true, and correct copy <sup>383</sup> of the chattel mortgage now on file in my office. Witness my hand and seal of my office at Malad City, Idaho, this the 16th day of September, 1901.

(Signed) "D. J. REYNOLDS,

"Recorder.

"By W. H. Richards,

"Deputy."

Defendants' attorney objected to the admission of the mortgage in evidence on the following grounds: 1. The mortgage was not dated; 2. That the affidavit that it was made in good

faith was sworn to by H. S. Young in his individual capacity, and not as an officer or agent of the plaintiff corporation; 3. That said affidavit alleged to have been sworn to by H. S. Young and Earnest A. Purnell did not contain, as is required by the statute of the state of Idaho, the word "defraud," or any word of similar import; 4. That the notary's certificate did not recite that Earnest A. Purnell was known to him to be, or proven on the oath of anyone to be, the signer of the instrument, as is required by the statutes of the state of Idaho, to wit, sections 2955 and 2958 of the Revised Statutes of Idaho of 1887; 5. For the reason that it was not recorded in the county of Cache, state of Utah; 6. That the alleged seal of the alleged county recorder of Oneida county was not attested as provided in sections 3378, 3387, subdivision 7, of the Revised Statutes of Utah of 1898; 7. That the evidence is insufficient to show that plaintiff is entitled to any of the relief prayed for. The objections were overruled, and the mortgage admitted "subject to said objections."

Plaintiff thereupon introduced evidence that the seven hundred sheep claimed were a part of the band of sheep which was mortgaged by the said Earnest A. Purnell, and of which he was the owner; that previous to the institution of this suit the plaintiff demanded from the defendants the sheep in dispute; and that the defendants refused to deliver them to the plaintiff. Hyrum J. Young, the notary public before whom the mortgage was acknowledged, testified, on behalf of plaintiff <sup>384</sup> in substance, that he was personally acquainted with the said Earnest A. Purnell, and that on or about the 5th of September, 1900, the said Purnell appeared before him, the said Hyrum J. Young, and made the affidavit and acknowledgment hereinbefore set out.

Plaintiff also introduced in evidence the said William Kidman's statement that he bought the sheep in question of Earnest A. Purnell some time in November, 1900; that at the time of the purchase the sheep were in Oneida county, state of Idaho; and that he brought them into Utah—and the following provisions of the Idaho statutes.

"Sec. 3385. Chattel mortgages may be made upon all property, goods or chattels not defined by statute to be real estate."

"Sec. 3397. If the mortgagor of any property mortgaged in pursuance of the provisions of this chapter, while such mortgage remains unsatisfied, in whole or in part, willfully re-

moves from the county or counties where the mortgage is recorded, destroys, conceals, sells or in any manner disposes of the property mortgaged, or any part thereof, without consent of the holder of said mortgage, he is guilty of larceny and such sale or transfer is void."

"Sec. 2952. The proof of acknowledgment of an instrument may be made without this territory, but within the United States, and within the jurisdiction of the officer, before either . . . a notary public," etc.

"Sec. 2955. The acknowledgment of an instrument must not be taken unless the officer taking it knows, or has satisfactory evidence, on oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in, and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation."

385 "Sec. 2958. The certificate of acknowledgment, unless it is otherwise in this chapter provided, must be substantially in the following form: 'Territory of Idaho, County of — ss. On this — day of — in the year — before me (here insert the name and quality of the officer), personally appeared — known to me (or proved to me on the oath of —) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or they) executed the same.'"

Also Session Laws of Idaho of 1899, page 121, as follows:

"Section 1. That title 12 of chapter 4, sections 3386 and 3387, be amended so as to read as follows: 'Sec. 3386. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless: 1. It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors; 2. It is acknowledged or proven as grants of real estate and the mortgage, or a true copy thereof, is filed for record with the county recorder of the county where such property is located and kept.'

"Sec. 2. Section 3387 is amended to read as follows: 'Sec. 3387. Upon receipt of any such instrument, the recorder shall indorse upon the back the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested,' " etc.

"Sec. 3. All acts and parts of acts inconsistent with this act are hereby repealed."

Some other evidence, which it is not necessary to set out, was introduced by plaintiff; and, when it rested, the defendants' attorney moved that the chattel mortgage be stricken out on the grounds of the original objections. This motion was denied, whereupon the "plaintiff then admitted that defendants had no other notice of the mortgage, except the notice imparted by the record of it in Oneida county, and that it <sup>386</sup> was not recorded in Cache county, Utah." "Thereupon the defendants moved the court to instruct the jury, upon the evidence of plaintiff, to bring in a verdict in favor of the defendants and against plaintiff, and upon the grounds stated above as objections to the introduction of the chattel mortgage." The court, on the grounds that the affidavit and the acknowledgment of the chattel mortgage were not in accordance with the provisions of the statute of Idaho, and that the chattel mortgage was not sufficient to charge defendants with notice of its existence, instructed the jury to return a verdict for the defendants, which was done, and judgment rendered thereon against the plaintiff.

1. In the absence of statutory provisions such as are contained in section 2955 of the Idaho Statutes, the law does not permit an officer to take the acknowledgment of a stranger without satisfactory proof of his identity, and when so taken it is a flagrant violation of official duty. As it is a presumption that officers perform their duty, and only a substantial, and not a strict, compliance with the form set out in the Idaho statute is required by that statute, the acknowledgment in question should not be literally, but liberally, construed. In *Kelly v. Calhoun*, 95 U. S. 713, Mr. Justice Swayne said: "Instruments like this should be construed, if it can be reasonably done, 'Ut res magis valeat quam pereat.' It should be the aim of courts in cases like this to preserve, and not to destroy. Sir Matthew Hale said they should be astute to find means to make acts effectual, according to the honest intent of the parties: *Carpenter v. Dexter*, 8 Wall. 513." There are many decisions which hold that "it is the policy of the law to construe acknowledgments liberally, and not to allow a conveyance to be defeated by unsubstantial and technical objections to the certificate of acknowledgment": *Wells v. Atkinson*, 24 Minn. 165. Certificates in the same form as the one in question, made under statutes which prescribe the <sup>387</sup> form of the certificate, and



require only a substantial compliance therewith, have been sustained in the following cases: *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776; *Wilson v. Quigley*, 107 Mo. 98, 17 S. W. 891; *Hiles v. La Flish*, 59 Wis. 765, 18 N. W. 435; *Harris v. Pratt*, 37 Kan. 316, 15 Pac. 216; *Burbank v. Ellis*, 7 Neb. 156. In *Northwestern etc. Hypotheek Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764, the certificate of acknowledgment was objected to on the ground that it did not comply with sections 2921, 2922 and 2960 of the Revised Statutes of Idaho. The statutes in force at the time the certificate was made, as appears from the opinion, did not "require a literal, but a substantial, compliance therewith," and the court held that the certificate objected to, and which is as follows: "I, L. F. Williams, a notary public in and for the said county and state, do hereby certify that on this thirtieth day of January, 1893, personally appeared before me A. Rauch and Margaret E. Rauch, his wife, to me known to be the individuals described in, and who executed, the within instrument, and acknowledged that they signed and sealed the same of their free and voluntary act and deed, for the uses and purposes therein mentioned. And I further certify that I did fully apprise the said Margaret E. Rauch, wife of the said A. Rauch, of the contents of said instrument, and of her rights thereto, and the effect of signing the same, and that she did then, freely and voluntarily, separate and apart from her said husband, sign and acknowledge said instrument. Given under my hand and official seal this 30th day of January, 1893. L. F. Williams, notary public. [Seal]"—was a substantial compliance with the following form prescribed by section 2960 of said statute: "Territory of Idaho, county of — ss. On this — day of — in the year of — before me (here insert the name and quality of the officer) personally appeared — known to me (or proved to me on oath of —) to be the person whose name is subscribed to the within instrument, described as a <sup>388</sup> married woman, and, upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution."

This decision is sustained by the same court in the cases of *Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 390; *Christenson v. Hollingsworth*, 6 Idaho, 89, 53 Pac. 211; *Curtis v. Bunnell etc., Co.*, 6 Idaho, 298, 55 Pac. 659. In the case of *Northwestern etc. Hypotheek Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764, the

language of the form set out in the territorial statute was followed in the certificate, but differed therefrom in several particulars, and failed to state in the expressed terms of the prescribed form that the wife, without the hearing of her husband, acknowledged that she did not wish to retract the execution of the instrument. The court, in holding that the certificate was a substantial compliance with the statute, quoted the following from the case of *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267: "The general rule upon this subject is that there must be a substantial, though not a literal, compliance with the terms of the statute, and that, although words not in the statute are used in place of others that are, or words in the statute are omitted, yet if the meaning of the words used is the same, or they represent the same fact, or if the omission of a word or words is immaterial, or can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be held sufficient."

This brings us to the question whether the certificate in this case substantially complies with the prescribed form. The identity of the mortgagor and his acknowledgment are the essential facts required to be shown by the certificate. If it does this, it substantially complies with the statute. In *Warder v. Henry*, 117 Mo. 538, 539, 23 S. W. 776, the court said: "The point of the objection is that the acknowledgment omits the words 'to me personally known,' after the words 'George W. Warder,' where they first <sup>389</sup> appear in the acknowledgment. Now, take the statute, and it will be seen that the officer should certify that 'before me appeared George W. Warder, to me personally known.' The certificate states, 'before me personally appeared,' etc. The officer in making this statement that George W. Warder personally appeared before him, includes therein the proposition that Warder was to him personally known; for, unless personally known, how could he say Warder personally appeared? The meaning and sense of the certificate of acknowledgment is the same as the statute." In the case of *Harris v. Pratt*, 37 Kan. 316, 15 Pac. 216, there were two deeds, the acknowledgments of which were contested. It was held that an acknowledgment of the first, which was made by register in bankruptcy, was not required by the bankrupt law. In respect to the other, the court said: "The second deed, made by the assignee of said estate to George P. Anderson, was acknowledged before a notary public. The objection to this acknowledgment is that the notary in his certificate does not

show that the assignee was personally known to him to be the person who signed the conveyance. . . . Now, while the certificate does not say in so many words that the grantor was personally known to him to be the person who signed the conveyance, yet it does state that the assignee personally appeared before him, and that his signature is to the conveyance. We think this was a substantial compliance with our statute." In the case of *Munroe v. Eastman*, 31 Mich. 285, the form of the acknowledgment was not prescribed, but the statute required a deed to be acknowledged by the party or parties executing the same. The certificate of acknowledgment was objected to because it failed to show that the grantor was known to the officer before whom it was made. Mr. Justice Cooley, in the opinion, said: "The justice certifies that the signer and sealer of the subjoined deed acknowledged it, and this implies a knowledge on his part of the fact." Under a statute which requires the acknowledgment to an <sup>390</sup> instrument, the identification by the certificate of the party executing it is as essential as under the Idaho statute. In the case of *Carpenter v. Dexter*, 8 Wall. 513-527, Mr. Justice Field said: "The law of Illinois in force in 1847, upon the manner of taking acknowledgments, provides that no officer shall take the acknowledgment of any person unless such person shall be personally known to him to be the real person who (executed the deed) and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness,' and such personal knowledge or proof shall be stated in the certificate. Looking now to the deed itself, we find that the attestation clause states that it was 'signed, sealed and delivered' in the presence of the subscribing witnesses. One of these witnesses was the justice of the peace before whom the acknowledgment was taken; and he states in his certificate, following immediately after the attestation clause, that the 'above-named William T. Davenport, who has signed, sealed, and delivered the above instrument of writing, personally appeared' before him and acknowledged the same to be his free act and deed. Read thus with the deed, the certificate amounts to this: that the grantor personally appeared before the officer, and in his presence signed, sealed, and delivered the instrument, and then acknowledged the same before him. An affirmation in the words of the statute could not more clearly express the identity of the grantor with the party making the acknowledgment."

In the case at bar, looking at the affidavit attached to the mortgage, immediately preceding the acknowledgment, we find from the jurat that the affidavit was subscribed and sworn to before the same notary public who took the acknowledgment of the mortgage. The certificate, read with this affidavit, clearly shows that the party who executed the mortgage was the same person who acknowledged the execution of the same. "An affirmation, in the words of the [Idaho] statute, could not more clearly express the identity of the <sup>391</sup> grantor [named in the chattel mortgage] with the party making the acknowledgment."

2. A mortgage of personal property is required by section 3386 of the Idaho statutes to be accompanied by the affidavit of the mortgagor "that it is made in good faith and without any design to hinder, delay or defraud creditors." Section 150 of the Revised Statutes of Utah requires a chattel mortgage to be accompanied by the affidavit of the parties thereto "that the same is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the mortgagor. The mortgage in question was executed in Utah, and the affidavit of the parties thereto is in strict conformity with the statute of this state. The second ground upon which the trial court directed a verdict for the defendants was that the certificate did not comply with the statute of Idaho. The specific objection urged by defendants' counsel is that the words "or defraud creditors" are omitted in the affidavit of the parties to the mortgage. Notwithstanding the words "or defraud creditors" are not used in the Utah statute, we think that its purpose and legal effect are the same as the Idaho statute. In the case of *Hoffman v. Mackall*, 5 Ohio St. 124-132, 46 Am. Dec. 637, Mr. Justice Bartley said: "It is argued that an assignment in trust for creditors, which by its provisions tends to hinder and delay creditors, is fraudulent and void. The provision of the statute of 13 Elizabeth, which was held to be declaratory of the common law in England, and which is said to have been followed literally in the statute of frauds in New York, declares 'every conveyance or assignment,' etc., 'made with intent to hinder, delay or defraud creditors,' etc., void. The provision in the Ohio statute omits the words 'hinder' and 'delay.' But I am not aware that this difference of phraseology is the foundation of any material distinction, in legal effect, between the English statute and that of Ohio. That hindering and delaying of a creditor which would bring



**392** an assignment within the operation of the statute of England would, I apprehend, constitute a fraud under the statute of Ohio." In the case of *Petrovitzky v. Brigham*, 14 Utah, 472, 475, 47 Pac. 666, the appellant omitted the word "hinder," but used the words "delay or defraud," and this court held that the affidavit substantially complied with the provisions of the statute of Utah before referred to. Mr. Justice Minor, in the opinion, said: "The question is raised whether the words 'delay or defraud,' as used in the affidavit, is a substantial compliance with the statute, without the use of the word 'hinder.' The words 'hinder' and 'delay' are used as synonymous terms. . . . The Encyclopedia Dictionary defines the word 'defraud' as meaning to deprive of a right by withholding from another, by indirection or device, that which he has a right to claim or obtain. The words 'hinder' and 'delay' are so practically of the same meaning that the omission of the word 'hinder' in the affidavit does not substantially detract from the object of the statute, or lessen the force of the words used in the affidavit, so as to make it defective, when used in connection with the word 'defraud.' A substantial compliance with the statute is all that is required. To hinder or delay is to do something with an intent to defraud." In 14 American and English Encyclopedia of Law, second edition, page 244, it is stated: "But, in order to render a deed fraudulent, it is not necessary that the debtor should intend to defeat the creditor in the collection of his claim. Creditors are entitled not only to be paid, but to be paid as their claims accrue; and a debtor has no more right to postpone payment simply for his own advantage, than to defeat it altogether. A purpose to hinder and delay a creditor is therefore fraudulent, although the debtor may honestly intend that all his debts shall ultimately be paid." The term "creditor," in its widest sense, is one who has a right to demand and recover of another a sum of money on any account whatever: *Anderson's Law Dictionary*, 291; *Winfield's Words and Phrases*, 162; *Waples on* **393** *Debtor and Creditor*, sec. 8. In this sense the term "creditors" was used in the Idaho statute. It appears from the evidence that the plaintiff paid to the mortgagor two thousand four hundred dollars as a consideration for the note and mortgage. The mortgagor had the legal right, in good faith, and without any intention of impairing the legal rights of creditors, to execute the mortgage to secure the payment of the note; and, if made in good faith and without any such intention, it was no infraction of the legal

rights of any creditor. There is no legal remedy for fraud unless it impairs a legal right. An act which neither hinders nor delays the creditor in the attainment of his legal rights cannot, in any view, defraud him. Therefore the averment in the affidavit in question that "the mortgage is made in good faith to secure the amount and debt therein specified, and without any design to hinder or delay the creditors of said mortgagor." is a negation of any design to defraud them.

3. The execution of the mortgage was shown by the testimony of Orson Rumel, who signed the same as a witness, and by other evidence. The mortgage was therefore valid, as against the mortgagor, and only void under the Idaho statute as against his creditors and subsequent purchasers in good faith and for value, even if it were conceded that the affidavit and certificate of acknowledgment are not sufficient, and that the mortgage was not filed for record in Idaho or Utah. The purchase of property in good faith for value is not available as a defense against a mortgage or conveyance which is valid as against the mortgagor or grantor, unless it is pleaded; and the burden of proving such a defense is upon the defendant, and in his answer he is required, among other things, to allege the consideration, and that it was bona fide and truly paid by him for the property purchased: 3 Estee's Pleading, sec. 3850; Maxwell's Code Pleading, 432 et seq.; 1 Modern Equity Practice, 346. The answer in this case fails to allege that defendants were bona fide purchasers, or that they purchased the sheep from the mortgagor or any other <sup>394</sup> person, and the evidence fails to show that they have actually paid or agreed to pay any money or other consideration for the sheep which the evidence shows they claimed to have purchased from the mortgagor.

Under the facts disclosed by the record, the mortgage was properly admitted in evidence, and the court below erred in directing the jury to return a verdict for the defendants.

From the views we have expressed, it is unnecessary to pass upon the other questions raised by counsel.

The judgment of the lower court is reversed, with costs, and the case remanded for a new trial.

Bartch, J., concurs.

ROLAPP, D. J. I dissent from the views expressed by the learned chief justice as to the sufficiency of the affidavit attached to the chattel mortgage in question. I fully agree with the

opinion expressed by this court in the case of *Petrovitzky v. Brigham*, 14 Utah, 472, 47 Pac. 666, that the words "hinder" and "delay" are practically synonymous terms. Under our statute the use of either word in the affidavit would make it valid, and the use of any additional words, such as "defraud," etc., would be treated as mere surplusage: *Reed v. Worthington*, 9 Bosw. 617. But under a statute which provides that a chattel mortgage is absolutely void as to subsequent bona fide purchasers of the mortgaged property unless it is accompanied by the affidavit of the mortgagor that the mortgage is made "without any design to hinder, delay, or defraud." I think that the omission of the word "defraud," or the absence of some word of similar import, is fatal to the validity of the document. It does not seem to me that any amount of reasoning will make the words "hinder or delay" include the word "defraud." The former words simply mean an effort to temporarily impede or intercept some right, property, or interest, which, however, will be ultimately secured; but the word "defraud" means an 395 effort by unlawful means to absolutely withhold and deprive of such right, property, or interest. While I concede that the word "defraud" may include the words "delay" or "hinder," I cannot concur that the latter words include the former. In the absence of statutory provisions to the contrary, the words "delay" and "hinder" involve no criminal intent, while the word "defraud" does. It is true that under certain circumstances an effort to hinder and delay might be evidence of an intent to defraud. As was said by the court in the case of *Hoffman v. Mackall*, 5 Ohio St. 124, 46 Am. Dec. 637, quoted by the chief justice in the majority opinion, "that certain kind of hindering and delaying of a creditor which would bring an assignment within the operation of the statute of England would, I apprehend, constitute a fraud under the statute of Ohio." To emphasize the view of that court that the words "hinder and delay" are not, in and of themselves, synonymous with the word "defraud," the court further on in the same opinion states: "By a reasonable construction, such hindrance and delay only as would operate as a fraud, and are designed as a fraud, come within the operation of the statute." And it was held in that very opinion that the hindrance and delay disclosed by the facts in that case did not come within the definition "defraud," under the Ohio statute. So I find several cases that hold proven intent to hinder or delay conclusively shows in-

tent to defraud: *Nicholson v. Leavitt*, 6 N. Y. 150, 57 Am. Dec. 499. But all these cases simply advance the doctrine that, as matter of evidence, it shall be considered *prima facie* or conclusively shown that an established purpose to hinder or delay a creditor will have the effect to defraud such creditor: 14 Am. & Eng. Ency. of Law, 2d ed., 244. I have been unable, however, to find any case in which the statute requires the word "defraud" to be contained in an affidavit or acknowledgment which has held that the use of that word might be obviated by the use of the words "hinder or delay." On the <sup>396</sup> contrary, in a well-considered opinion by the supreme court of Wisconsin, we are warned that "the distinction between a mere intent to hinder and delay creditors and the intent to defraud them must not be confounded. The statute clearly recognizes this distinction, and makes void all conveyances made with intent to hinder, delay, or defraud creditors. This language implies that the intent to defraud is something distinct from the mere intent to delay, and it is frequently the case that debtors, with an honest intention to pay their creditors in the end, make some shift or transfer merely to gain time": *Pilling v. Otis*, 13 Wis. 495; *Crow v. Beardsley*, 68 Mo. 439.

For these reasons I think the lower court properly held that the chattel mortgage, introduced by plaintiff below as the only basis of its title, was fatally defective and void as against the defendants, who were admittedly bona fide purchasers, without actual notice.

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*In Taking and Certifying Acknowledgments*, a literal and exact compliance with the statute is not essential. A fair and substantial compliance is enough, and that will be exacted: *Pickens v. Kuisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 18 S. E. 932; *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562; *Frederick v. Willecox*, 119 Ala. 355, 72 Am. St. Rep. 925, 24 South. 582; monographic note to *Livingston v. Kettelle*, 41 Am. Dec. 168-184. Courts construe the language of certificates of acknowledgments liberally, and uphold them if it can be done by a fair and reasonable construction. But no intendments and presumptions are indulged in their favor: *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729, 87 N. W. 1008.

*If a Chattel Mortgage* is not properly acknowledged, its recording is not constructive notice to subsequent purchasers and encumbrancers: *Thompson v. Scheid*, 39 Minn. 102, 12 Am. St. Rep. 619, 38 N. W. 801. See, also, *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

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**OSHKOSH WATERWORKS COMPANY v. CITY OF OSHKOSH.**

[109 Wis. 208, 85 N. W. 376.]

**CONSTITUTIONAL LAW—Impairment of Obligation.**—An act which in any degree, no matter how slightly, modifies the obligation of a contract, by attempting to relieve one party from any duty by the contract assumed, is repugnant to the constitutional prohibition against the impairment of the obligation of contracts. (p. 873.)

**CONSTITUTIONAL LAW—Vested Right to Remedy.**—Over mere remedial procedure the power of the legislature is absolute, and laws regulating it involve so much of the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein. (p. 873.)

**CONSTITUTIONAL LAW—Impairment of Obligation.**—If neither party is relieved from performing anything of that which he obliged himself to do, the obligations of the contract are not impaired; but, if he is absolved from performing any of those things, such obligations are impaired, whether the absolution is accomplished directly and expressly, or indirectly and only as a result of some modification of the legal proceedings for enforcement. (p. 876.)

**CONSTITUTIONAL LAW—Impairment of Obligation.**—A variance of policy as to liberality of amendment in judicial proceeding cannot be said to impair the obligation of contracts. (p. 882.)

**CONSTITUTIONAL LAW—Impairment of Obligations.**—The requirement of certain new steps for the enforcement of a demand, incidentally resulting in a reasonable delay, does not work an impairment of the obligation of contracts. (p. 883.)

**CONSTITUTIONAL LAW.**—It is not an Impairment of the Obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties. (pp. 884, 885.)

**CONSTITUTIONAL LAW—Impairment of Obligation—Procedure for Presenting Claims Against City.**—The obligation of contracts with a city is not impaired by an amendment to its charter

providing that no action upon a claim against it shall be maintained until it has been presented to the city council for allowance and disallowed in whole or in part, either by affirmative action or by failure to pass upon it for sixty days; and that a disallowance shall be final and conclusive and a bar to any action, unless within twenty days an appeal to the circuit court is taken, with a bond for costs to be approved by the city attorney and city comptroller. (pp. 872, 885.)

Appeal by the plaintiff from a judgment dismissing its complaint, entered on sustaining a demurrer thereto. The complaint alleged the making of a contract between the plaintiff and defendant, on June 18, 1883, for payment to the plaintiff, quarterly, of a certain sum for supplying the water to hydrants for city purposes; the construction of waterworks by the plaintiff, in compliance with that contract, on or before October 1, 1884; and the refusal of the city to pay the hydrant rental earned under such contract for the quarter ending October 1, 1898; also the making of a subsequent contract, on August 31st, for the payment of hydrant rentals on certain extensions, the performance thereof by the plaintiff, and the refusal of the defendant to pay the hydrant rental thereon for the same quarter.

Hooper & Hooper, for the appellant.

John F. Kluwin, for the respondent.

**209** DODGE, J. The only assignment of error argued by appellant is that the court erred in holding that the charter of the city of Oshkosh (Laws 1891, c. 59) did not, so far as it relates to the contract of June 18, 1883, impair the obligation of the contract. It is contended that said charter **210** does so impair, and therefore contravenes section 12, article 1, of the constitution of Wisconsin, which provides: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contract, shall ever be passed."

At the time of making the contract of June 18, 1883, the city of Oshkosh existed and operated under a charter known as chapter 183 of the Laws of 1883, the first section of which constituted it "a municipal corporation by the name of the city of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity." That charter (sec. 1, subc. 7) provided that moneys "shall be drawn out only upon the order of the mayor and city clerk, duly authorized by vote of the common council"; and by section 10, subchapter 7, "any account or de-

mand against the city, before acted upon or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law." Except for these restrictions upon the payment of money, the city of Oshkosh was subject to suits upon contract liability like any other person or corporation.

In 1891 was enacted a revised charter (Laws 1891, c. 59) continuing substantially the provisions formerly existing in the first section and in sections 1 and 10, subchapter 7. That charter, however, contained a subchapter 21. It provided:

"Sec. 4. No action shall be maintained by any person against the city upon any claim or demand until such person first shall have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation of such claim shall be deemed a disallowance thereof.

"Sec. 5. The determination of the common council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council as in this act provided."

<sup>211</sup> Section 6 provided for the appeal in case of disallowance in whole or in part, to be accomplished by serving a written notice of the appeal on the city clerk within twenty days after the disallowance of the claim, and by executing a bond to the city in the sum of one hundred and fifty dollars, with two sureties, to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of the appeal and payment of costs; whereupon the clerk is required to transmit the decision and a brief statement of the proceedings and all papers to the clerk of the circuit court of the county, where "such case shall be entered, tried, and determined in the same manner as cases originally commenced in said court," costs to be recovered by plaintiff in case of an increase in the recovery.

This amendment of the charter of Oshkosh was but one of many such amendments to city charters occurring at about that time, significant of a marked change of legislative policy with reference to enforcement of money demands against cities. That policy was signified by its adoption in the general city charter promulgated by the legislature of 1889 for cities thereafter to be organized. That policy has been considered by this court in a series of decisions, which it is believed have fully

recognized and emphasized it. We have held that the preliminary steps are jurisdictional, and that unless complied with the court fails to acquire jurisdiction of the subject matter; that the various steps are mandatory, and cannot be waived by the officers of the city, nor can jurisdiction be conferred by such officers (*Telford v. Ashland*, 100 Wis. 238, 75 N. W. 1006; *Oshkosh W. W. Co. v. Oshkosh*, 106 Wis. 83, 81 N. W. 1040); that the bond cannot be amended nor a new bond given after the expiration of the twenty days: *Oshkosh W. W. Co. v. Oshkosh*, 106 Wis. 83, 81 N. W. 1040.

It is, of course, obvious that the amendment of the charter does not expressly and directly affect the obligation of any existing contracts. It is a change of the law regulating <sup>212</sup> the remedy, and obviously, too, with only that purpose in view. The question, therefore, which is presented before us, is whether, as to claims which have not been allowed by the council (for there is no allegation that this has been allowed), the change in the methods open to a creditor of the city for the adjudication and recovery of such claim is such that, although acting directly only on the remedy, it necessarily impairs the obligation of the contract itself.

We here enter a field redundant of learned discussion, philosophy, and decision, in which, as remarked by Mr. Justice Shiras, the very frequency of decision would appear to have rendered it difficult to apply the result of the court's deliberations to new cases, differing somewhat in their facts from those previously considered: *Barnitz v. Beverly*, 163 U. S. 121, 16 Sup. Ct. Rep. 1042. Several general propositions are, however, settled so as to require in new cases merely their application. First and most primary among these is that an act which in any degree, no matter how slightly, modifies the obligation of the contract by attempting to relieve the one party from any duty by the contract assumed, is repugnant to the constitutional prohibition. This rule applies to "legislation which affects the contract directly, and not incidentally, or only by consequence": *Von Hoffman v. Quincy*, 4 Wall. 553. Another general rule early established is that over mere remedial procedure the power of the legislature is absolute; that laws regulating it involve so much the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein. For example, it would be intolerable that new laws regulating place or frequency of the sitting of courts could not be enacted and be effective generally, even as to pre-existing rights



of individuals, although remotely they affect those rights by adding inconvenience or delay to their enforcement.

**213** It is obvious, however, that rights, whether contractual or other, are so dependent for their value upon the means of enforcing them that for all practical purposes their extinction may be accomplished by laws which, in form, affect only the remedy. It matters little whether it be enacted that certain debts are extinguished or merely that they shall not be enforceable in any forum. In either case the legally binding obligation to pay is destroyed. One of the best actual illustrations of such a result is exhibited by *Cornell v. Hichens*, 11 Wis. 368, where was considered an enactment that in any suit on negotiable bonds and mortgages given to a railway company, although brought by an innocent holder for value, the defendant might answer, alleging misrepresentation in procurement or want of consideration; that such issue should then be tried by a jury; and that, if the jury found such fact to exist, judgment should be entered for the defendant. That law ostensibly regulated the remedy only, the pleadings and procedure in the course of a suit, but its direct and obvious intention and result was to absolve the defendant from his promise, by law embodied in the negotiable bond, that he would pay the amount to any bona fide holder, even though it had been obtained from him by misrepresentation or without consideration—a result prohibited by the constitution.

In attempted recognition both of the necessity for freedom of general legislation as to remedies and procedure and of the constitutional inviolability of the obligation of contracts, the courts early sought middle ground on which both rights might be protected. In Wisconsin, the limits of that middle ground have received definition in a multitude of cases, important among which are the following: *Lightfoot v. Cole*, 1 Wis. 26, 33; *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Starkweather v. Hawes*, 10 Wis. 125; *Cornell v. Hichens*, 11 Wis. 368; *Streubel v. Milwaukee etc. R. R. Co.*, 12 Wis. 67; *Oatman v. Bond*, 15 Wis. 20; *State v. Common Council* **214** of Madison, 15 Wis. 30; *Paine v. Woodworth*, 15 Wis. 298; *Hasbrouck v. Shipman*, 16 Wis. 296; *Selsby v. Redlon*, 19 Wis. 17; *Nelson v. Rountree*, 23 Wis. 367; *Sydnor v. Palmer*, 32 Wis. 406, 410; *Northwestern Mut. Life Ins. Co. v. Neeves*, 46 Wis. 147, 49 N. W. 832; *Lee v. Buckheit*, 49 Wis. 54, 4 N. W. 1077; *Rosenthal v. Wehe*, 58 Wis. 621, 17 N. W. 318; *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385; *Second*

Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31; Peninsular etc. Works v. Union etc. Co., 100 Wis. 488, 69 Am. St. Rep. 934, 76 N. W. 359; Eau Claire Nat. Bank v. Macauley, 101 Wis. 304, 77 N. W. 176.

In *Lightfoot v. Cole*, 1 Wis. 26, 34, in discussing a statute which abolished the pre-existing common-law and equitable suits on claims against insolvent estates, and substituted in lieu a presentation and hearing before commissioners appointed by probate court, this court, by Crawford, J., declared: "It was entirely within the control of the legislature to prescribe and modify the remedies which might be pursued in the courts of the territory, and to provide one particular manner of proceeding, to the exclusion of others, so long as some specific remedy was preserved."

The subject received more thorough consideration in *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283, where was presented a law providing that, in suits to foreclose mortgages, defendant should have six months to answer before default, instead of twenty days, and that notice of sale should be published six months, instead of six weeks, as theretofore required. The rule under consideration was there laid down (page 577) by Dixon, C. J., as follows: "It being determined that the remedy, or laws for enforcement of a contract existing at the time it is made, enter into it and form a part of its obligation, it might perhaps be supposed that any repeal, change, or amendment of such remedy, or laws which in any manner delayed or rendered the enforcement of the contract less complete and effectual, would be unconstitutional and void. But such is not the case. All the authorities agree that it is within the power of the legislature to repeal, <sup>215</sup> amend, change, or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made." The court also adopted the following language from *Bronson v. Kinzie*, 1 How. 311: "Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the

contract itself. In either case, it is prohibited by the constitution."

This subject received renewed careful attention in the recent cases of *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31, and *Peninsular etc. Works v. Union etc. Co.*, 100 Wis. 488, 69 Am. St. Rep. 934, 76 N. W. 359, where the rule of *Von Baumbach v. Bade*, 9 Wis. 559, was substantially reasserted, it being said in elucidation thereof by Pinney, J.: "Any legislation, though acting merely on the remedy, that substantially impairs or lessens the value of a contract, is forbidden by the constitution, and therefore void."

The latest declaration of the rule on this subject by the supreme court of the United States is found in *McCullough v. Virginia*, 172 U. S. 102, 124, 19 Sup. Ct. Rep. 142, as follows: "It is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if any adequate and efficacious remedy be left."

It is conceived that the various forms of expression adopted are intended to express the same idea, namely, that, if neither party is relieved from performing anything of that which he obliged himself to do, the obligations of the contract are <sup>216</sup> not impaired; but, if he be absolved from performing any of those things, such obligations are impaired, whether the absolution is accomplished directly and expressly, or indirectly and only as a result of some modification of the legal proceedings for enforcement. As the subject is in every case an important one, and as the attempts of different writers and jurists to express the true rule thereon do not entirely agree, and, at best, seem to be capable of different interpretations, it has seemed to me advisable, even at the expense of considerable space, to bring together the concrete instances of application of that rule by this court and by the supreme court of the United States, which is, of course, the ultimate authority. The following are substantially all of the important cases in this court, and the most typical of those in the United States supreme court, which are valuable illustrations under the rule we are now considering:

A statute cutting off ordinary and common-law proceedings previously existing for enforcement of claims against executors when the estate was insolvent, and prescribing a special remedy by presentation and proof before commissioners of the probate court, and ratable sharing in the assets, held within the power

of the legislature because some specific remedy was preserved: *Lightfoot v. Cole*, 1 Wis. 26.

An act changing the time for answer and default from twenty days to six months in foreclosure actions, and changing notice of sale from six weeks to six months, held not to impair the obligation of pre-existing mortgages: *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283.

The same act held applicable to sales under pre-existing judgments, and sustained: *Starkweather v. Hawes*, 10 Wis. 125.

A law giving a laborer for railroad contractors right of recovery against the company, amended after performance of <sup>217</sup> work so as to take away that right, held not to impair the contract of indebtedness between the laborer and his employer, but merely to take away one of two remedies, leaving still an adequate remedy against his debtor. On rehearing, it was concluded that the earlier statute created a contract between the laborer and the railroad company, and the obligation of such contract was by the later act impaired because the only remedy was destroyed: *Streubel v. Milwaukee etc. R. R. Co.*, 12 Wis. 67.

Change of procedure in method of acquiring and enforcing log liens not unconstitutional, as applied to existing claims: *Paine v. Woodworth*, 15 Wis. 298.

Statute validating executions under justice of the peace judgments held constitutional: *Selsby v. Redlon*, 19 Wis. 17.

A statute enacted after a judgment in ejectment, taking away the pre-existing right of course to a motion and order for a new trial, held matter of remedy only and valid: *Sydnor v. Palmer*, 32 Wis. 406.

Change of procedure for foreclosure of mortgages, whereby, instead of an immediate personal judgment, to be followed by an immediate sale subject to one year's redemption, there was only permitted a judgment postponing the sale for one year, and allowing a personal judgment only for the deficiency to be ascertained after such sale, held to merely regulate the remedy and not impair obligations of the mortgage: *Northwestern etc. Ins. Co. v. Neeves*, 46 Wis. 147, 49 N. W. 832.

A statute imposing additional terms on change of venue, held goes only to remedy, affects pre-existing actions, and not unconstitutional: *Lee v. Buckheit*, 49 Wis. 54, 4 N. W. 1077.

Change of practice as to mechanics' lien from law to equity, with substantial alteration as to form of judgment, method



of sale, etc. (Rev. Stats. 1878, c. 143), held applicable to pre-existing claims. Constitutionality apparently never questioned: *George v. Everhardt*, 57 Wis. 397, 15 N. W. 387.

Existing law made validity of attachment depend on sufficiency <sup>218</sup> of accompanying affidavit. Subsequent statute permitting attachment to stand on amended affidavit afterward filed, held remedial only, and to apply to pre-existing contracts and suits: *Rosenthal v. Wehe*, 58 Wis. 621, 17 N. W. 318.

Abolition of imprisonment for debt held no impairment of contract: *Sturges v. Crowninshield*, 4 Wheat. 122; *Penniman's Case*, 103 U. S. 714.

Reasonable additional exemptions from execution do not impair obligation of contract: *Brownson v. Kinzie*, 1 How. 311, and *Edwards v. Kearzey*, 96 U. S. 595, 604 (opinions Hunt and Clifford, JJ.; contra, Swayne, J.).

Statute changing the law, by requiring that suit on notes owned by banks be brought in the name of the cashier, does not impair the obligation of contracts: *Crawford v. Branch Bank*, 7 How. 279.

Existing law as to sale of decedent's real estate required it to be at public, open sale, on full notice, and new law authorized a private sale under direction and approval of the court. Held, no impairment of existing contracts between estate and its creditors: *Florentine v. Barton*, 2 Wall. 210.

Imposing a notice as a condition of taking out tax deed held no impairment of contract embodied in the certificate: *Curtis v. Whitney*, 13 Wall. 68, affirming *Curtis v. Morrow*, 24 Wis. 664.

Where charter of corporation required service of process on its president, a subsequent statute authorizing service on other officers held not to impair the contract: *Railroad Co. v. Hecht*, 95 U. S. 168.

Statutes of limitation, provided reasonable time is allowed for commencement of suit: *Terry v. Anderson*, 95 U. S. 628; *Koshkonong v. Burton*, 104 U. S. 668; *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. Rep. 312; *Relyea v. Tomahawk etc. Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412.

Under pre-existing law, state bank bills were made receivable for taxes. Taxpayer could compel receipt by mandamus, or have other common-law remedies. New law <sup>219</sup> prohibited their receipt, and also prohibited any process to compel it, and denied all remedy, except to allow payment under protest after

tendering the bank bills, and a suit substantially against the state to recover back, the judgment to be enforceable only by entitling claimant to a comptroller's warrant, payable when funds were in state treasury. Held that, an adequate remedy being given, there was no impairment of the obligations of the contract resulting from the cutting off of the former existing remedies: *Tennessee v. Sneed*, 96 U. S. 69; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. Rep. 91; *McCullough v. Virginia*, 172 U. S. 102, 124, 19 Sup. Ct. Rep. 134.

Nor did impairment result from a later statute repealing that above mentioned, whereby the existing remedy of suit against the state was taken away, and common-law remedies revived: *McCullough v. Virginia*, 172 U. S. 102, 19 Sup. Ct. Rep. 134.

A statute subsequent to the issue of bonds prohibited mandamus or other process against individual officers of a city to enforce judgment, and also prohibited execution, and substituted as the sole remedy a registration of the judgment, accompanied by a duty on the city officers to pay out of first available money. Held, adequate remedy for enforcement of pre-existing debts, and not unconstitutional, reserving power of court to compel city to provide money if it failed to do so in the next succeeding tax levy: *Louisiana v. New Orleans*, 102 U. S. 203.

Under pre-existing law of Louisiana, minors, etc., had tacit mortgages on the property of their guardians and tutors. A subsequent act denied validity to such tacit mortgages unless registered, allowing less than a year for registration of existing ones. Held, valid for the reason that it left an adequate remedy: *Vance v. Vance*, 108 U. S. 514, 518, 2 Sup. Ct. Rep. 854.

Law authorizing service of process on mayor or clerk may be changed to require service on the mayor without impairing obligation of prior contracts: *Perkins v. Watertown*, 5 Biss. 320, Fed. Cas. No. 10,991.

<sup>220</sup> Chapter 49 of the Laws of 1858 made fraud in procuring railroad farm mortgages or want of consideration an absolute defense in suit, even by an innocent holder for value. Held, to impair the obligation of the contract: *Cornell v. Hichens*, 11 Wis. 368.

Chapter 88 of the Laws of 1861 greatly modified the remedy upon farm mortgages to corporations. It required security for costs; deprived parties of trial before court, substituting a

referee, with extremely dilatory procedure before him; gave intermediate appeal on rulings as to evidence, with stay; extended the time for appeal four years, with stay meanwhile, apparently without bond; provided that no title should be acquired on the sale under any judgment until that time for appeal expired; provided that such sale should be of no effect in case of reversal; denied the right to any deficiency judgment; denied plaintiff right of appeal until he had paid all costs; required suit on the note or bond alone to be in the county where the mortgaged premises were situated; declared that the plaintiff should be deemed to hold the security *prima facie* with full notice of all equities; stayed all sales under power of sale in the mortgage, in case misrepresentation or want of consideration were alleged, until such issue should be finally determined; and deprived the plaintiff of all other remedies except those specified in the chapter. This act was held to so burden the remedy as to impair the obligation of the contract. The court said that several of the detailed provisions, taken alone—as, for example, the requirement of security for costs—would not of themselves have that effect, but that the purpose of the act was so obviously to embarrass, restrict, and postpone the enforcement of these mortgages according to their terms that it must be held void: *Oatman v. Bond*, 15 Wis. 20.

A law authorizing the issue of certain city bonds required the levy of a tax to meet the same. A subsequent act prohibited <sup>221</sup> the city from raising any taxes, except for each year's interest as it accrued. Held, unconstitutional so far as it prohibited a tax to meet judgments on previously defaulted interest: *State v. Common Council of Madison*, 15 Wis. 30.

Suspension of all process against volunteers "during service" held to impair the obligation of the contract because it deprived the creditor of all remedy for an indefinite period—as the court said, "five, ten, or twenty years": *Hasbrouck v. Shipman*, 16 Wis. 296. The contrary has been held in other states, where the suspension was not indefinite: *McCormick v. Rusch*, 15 Iowa, 127; *Breitenbach v. Bush*, 44 Pa. St. 313, 84 Am. Dec. 442; *Clark v. Martin*, 49 Pa. St. 299.

Statute making order of publication proof of sufficiency of grounds therefor held no constitutional as applied to pre-existing void judgments: *Nelson v. Rountree*, 23 Wis. 367.

Statute giving subcontractor's lien limited by the amount of the owner's debt to the contractor, changed to make owner

liable without limit, held to modify the obligation of existing contract between owner and building contractor, and therefore unconstitutional: *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385.

Statute giving debtor power to vacate the lien of an execution or attachment by making assignment within ten days thereafter impairs obligation of existing contracts and is unconstitutional: *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31; *Peninsular etc. Works v. Union etc. Co.*, 100 Wis. 488, 69 Am. St. Rep. 934, 76 N. W. 359; *Eau Claire Nat. Bank v. Macauley*, 101 Wis. 304, 77 N. W. 176.

Statute prohibiting sale, under power contained in a mortgage, for less than two-thirds of an appraisal, and giving one year for redemption, held to impair the obligation: *Bronson v. Kinzie*, 1 How. 311.

Law staying execution of a judgment or enforcement of a contract impairs the obligation: *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, and cases there cited.

<sup>222</sup> Laws requiring that negotiable coupons from existing state bonds must, before receipt for taxes, be accompanied by principal bond, and that their genuineness be established without expert evidence, held to impair obligation. Production of principal bond inconsistent with contracted negotiability of separate coupons. Expert evidence only way to prove genuineness of printed coupons, and its exclusion worked complete repudiation. Intent to repudiate the coupons was obvious, and provisions only parts of general scheme: *McGahey v. Virginia*, 135 U. S. 685, 10 Sup. Ct. Rep. 972.

In the light of the general rules on the subject, and the foregoing illustrations of their application, we turn to an examination of the changes in procedure for enforcement of claims not allowed by the council, accomplished by amendment of defendant's charter. Under the former law, jurisdiction of the court could be invoked by service of summons, which, if accompanied by complaint, the city must answer within twenty days, except for extension of time in discretion of court. Defects in summons or service thereof could be waived by voluntary appearance. Mistakes in procedure whereby plaintiff failed of hearing on the merits usually worked only nonsuit, and he might sue again, subject only to statute of limitations. In contrast with this procedure, it is pointed out that under the charter of 1891 the plaintiff, before invoking jurisdiction of any court, must file his claim with the city clerk, and must await examination by the comptroller, and action of the coun-



cil disallowing it, which may postpone him sixty days, instead of twenty. Further, in order to reach a judicial forum, he must give security for costs in a form prescribed by law, and with sufficient sureties. He must obtain approval of the sureties by the city attorney and comptroller. Practically, he must do this within twenty days, appellant contends; for, if a new bond be rendered necessary by a disapproval, that must be filed within that period from the <sup>223</sup> disallowance of the claim. No method for coercing the action of these officers is expressly provided. Appellant also suggests the possible absence of either, casual or intentional, as a contingency burdening a claimant's chances of reaching the court. Lastly and most urgently, counsel dwells on the asserted inability to correct any mistakes by amendment, and on the fatal effect of any such mistakes, not only on the action, but upon the cause of action as well.

Some of these changes are too immaterial to require extended comment. Service of notice of appeal on the city clerk in lieu of service of summons on the mayor is so. Nor are we impressed with the importance of the asserted inability of a claimant to cure defects in procedure by amendment. It can hardly be said that there is any vested right to make mistakes. A variance of policy as to liberality in permitting amendment cannot be said to impair the obligation of any contract. A law permitting amendment of attachment affidavit has been held valid as to existing contracts and actions: *Rosenthal v. Wehe*, 58 Wis. 621, 17 N. W. 318. Why not the converse? The fact that a failure to obtain judgment by reason of errors in procedure or lack of proof, which in ordinary practice would result only in nonsuit, leaves claimant barred of his claim, no more affects the obligation than does a statute of limitations leaving reasonable time to sue, but expiring before the defectiveness of an attempted suit is discovered. It certainly comes no nearer such obligation than does an act taking away one's right to a second trial as of course after a judgment in ejectment: *Sydnor v. Palmer*, 32 Wis. 406.

Perhaps the most cogent of appellant's objections to the new procedure, is that there is a period of suspension of his right to sue, resulting from the requirement that he must first present his claim to the council and await its disallowance. It is by no means certain that such obstacle is a new one. It has been held that the statute <sup>224</sup> (Rev. Stats. 1858, c. 15, secs. 79, 80), requiring claims to be presented to town

boards of audit before they could be paid, impliedly prohibited suit until that had been done: *Putnam v. Rubicon*, 32 Wis. 498. That statute is not very obviously distinguishable from the requirements of the Oskosh charter of 1883, either in the procedure indicated or the legislative purpose to be accomplished. It is not, however, necessary to decide upon their identity at this time. It will be observed that while unconstitutionality has been ascribed to legislation which directly postponed the ultimate acts for the enforcement of a contract right, as by staying execution or creating or extending period of redemption from judicial sales (*Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042), no case has been cited to us, and none discovered, where reasonable delay, resulting incidentally from the requirement of certain new steps in procedure, or from enlargement of time for taking such steps, has been held fatal, provided such legislation did not clearly appear to be in bad faith and for the purpose of defeating or impairing the very obligations of the contract. On the other hand, such modifications of proceedings imposing either increased burdens or increased time have been recognized as legitimate exercise of legislative power over remedies and procedure: *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Starkweather v. Hawes*, 10 Wis. 125; *Lee v. Buckheit*, 49 Wis. 54, 4 N. W. 1077; *Relyea v. Tomahawk etc. Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412; *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. Rep. 854; *Clark v. Martin*, 49 Pa. St. 299. In addition to these instances, it is worthy of note that very many such enactments have been enforced without challenge, some of them since very early days, thus adding the tacit consensus of legislature, courts, and the profession to a construction of the constitution which permits them. Among such may be noted the adoption, with reference to claims against counties, of the same policy as that with reference to cities, now complained of (Stats. 1898, secs. 676, 682, 683); the postponement of suits against towns until after presentation<sup>225</sup> and consideration of claim (sec. 821); the stay laws for purposes of reassessments (sec. 1210b; *Plumer v. Marathon Co.*, 46 Wis. 163, 50 N. W. 416); and many others. The requirement that before invoking judicial action the claimant must submit his claim to consideration of the common council is not a serious burden upon him. In practical affairs the instances are rare, if not unknown, that a claimant commences suit until he has first invited payment without suit.

The effect of the charter of 1891 is to limit, not enlarge, the period necessary to constitute a demand and refusal of payment. In the matter of demands against municipalities the importance of momentary opportunity to sue is far less than with individual debtors, who during even a few days may by transfer of property or otherwise become execution proof, and thus defeat the purpose of an action.

The only remaining obstacle to judicial hearing and enforcement which appellant urges upon our attention is the requirement of a bond for costs in the sum of one hundred and fifty dollars. This is in itself hardly a new burden; for our practice statutes have since long prior to 1883 subjected plaintiffs to a security for costs, in the discretion of the court, in still larger amount. Independently of this view, however, the absolute requirement that a plaintiff shall furnish reasonable security for costs, as prerequisite to suit, cannot be considered so completely a denial of adequate remedy as to impair the obligation of existing contracts. It is a very usual requirement of practice, statutes and rules. If our statutes were changed so that such a preliminary were absolutely required by law for all suits, instead of being permissibly required by the court as now, we apprehend there could be no doubt that such change is within the legitimate control of the legislature over procedure. Such is the suggestion in *Oatman v. Bond*, 15 Wis. 20. But counsel urges that the bond is not amendable, and a mistake therein is fatal to the cause of action. The answer to this suggestion <sup>226</sup> is that no mistake need be made. The charter, in terms easy of comprehension if carefully read, prescribes what the bond shall be, and compliance therewith is not difficult. A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract does not impair the obligation because one straying out of the prescribed path cannot reach the goal. But, again, counsel says the statutory requirement that the bond be approved by the city attorney and comptroller renders it possible for those officers, either willfully or by neglect, to exclude him from his remedy in court. Whether this be so has not yet been decided. If an appellant files a good and sufficient bond in compliance with law, it is by no means certain that the courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion. But it is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by

public officers of their duties. The duty of the city attorney and comptroller to approve a proper bond is one cast on them by law, for breach of which one injured may have his remedy, as well as against the sheriff on whom he must depend for enforcement of an execution. All remedies depend upon performance of duty by public officers, and by breach thereof may fail. That is true even of the privilege of action in the courts, wherein breach of duty by the judge might most effectually postpone or entirely defeat the claim; but such possibility does not render the remedy inadequate.

That the change of legislative policy as to procedure upon claims against Oshkosh and many other cities was adopted in the utmost good faith, with no legislative purpose other than promotion of public welfare and proper protection of public funds against unlawful demands, cannot be doubted: *Putnam v. Rubicon*, 32 Wis. 498; *Seegar v. Ashland*, 101 Wis. 515, 77 N. W. 880. It is the duty of the courts to uphold and enforce <sup>227</sup> such deliberately adopted and important changes of policy, unless it appears clearly and beyond all reasonable controversy that the legislative power has been exceeded: *Adams v. City of Beloit*, 105 Wis. 363, 373, 81 N. W. 869. After careful consideration of the changes wrought by the amendment of 1891 to the Oshkosh charter, we are unable to say with the requisite certainty that the legislature has transgressed the bounds to its authority over remedies and procedure by so modifying them as to relieve the city from any obligation resting upon it by reason of the contract with plaintiff, or to so diminish the remedy as to render those obligations substantially less valuable. We, therefore, are bound to enforce the law as it is written, and affirm the decision of the trial court in sustaining the demurrer to the complaint.

By the Court. Judgment affirmed.

**Justice Bardeen Dissented**, saying in part: "The substantial question in this case is whether the new charter so affects the remedy as to impair the obligation of plaintiff's contract and render it less valuable. I cannot persuade myself that it does not. The conditions and restrictions thrown around the attempt to get into court are so complex and indefinite, and are to be followed with such nicety of exactness, at the peril of losing the remedy entirely, and are so completely different from those in existence when the contract was made, that in my opinion they so lessen the efficacy of the remedy, retard its enforcement, and diminish its value as to come within the condemnation of the constitution. I refer particularly to those



charter provisions as to when the time within which an appeal must be taken commences to run, and the requirements relating to the giving and approval of the bond. The latter provisions seem to me to be of special significance. The appellant must take its appeal, get its bond, and secure the approval of both the city attorney and city comptroller in twenty days, or its rights are forfeited. The charter contains no provisions regarding the responsibility of sureties, does not say what the appellant must do to satisfy the city attorney and comptroller as to the sufficiency of the bond, but leaves it entirely to those officers to approve or not, at will. If, perchance, one of those officers should be absent from the city during the time the right to appeal is running, the appeal is lost. The old charter contained no such technical or drastic conditions. There are several other changes which to my mind tend to lessen the value of the contract and to postpone and retard its enforcement, but I need not mention them at length. The impression in this regard is so strong that I cannot agree with the conclusion of the majority of the court."

**The Supreme Court of the United States** affirmed the decision of the principal case: See *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 23 Sup. Ct. Rep. 234. Mr. Justice Harlan delivered the opinion of the court as follows:

"This case presents a question under the clause of the constitution of the United States which prohibits a state from passing a law impairing the obligation of contracts.

"The question arose upon demurrer by the defendant, the city of Oshkosh, to the complaint filed against it on the sixteenth day of June, 1900, by the Oshkosh Waterworks Company, a municipal corporation of Wisconsin. The principal ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action.

"The complaint set forth two causes of action, on the first one of which the company claimed a judgment for four thousand and eighty-five dollars, which was alleged to be due from the city under an agreement made between it and the company on June 18, 1883, in reference to the building and maintaining by the company of a waterworks plant for supplying water for domestic and fire purposes, and the renting of public fire hydrants.

"On the second cause of action the company asked a judgment for one thousand and sixty dollars, which amount was claimed under an agreement of the thirty-first day of August, 1891, having reference to the company's extensions of its then existing mains, and the rentals to be paid by the city for hydrants to be located on such extensions.

"After the contract of 1883 was made, the charter of the city was amended and revised—the revision taking effect March 23, 1891. The revised charter contained certain provisions as to suits against

the city, imposing on suitors conditions or restrictions that did not previously exist.

“The company insisted that the revised charter could not be applied to this suit without impairing the obligation of its contracts with the city. This view was rejected by the state court, the demurrer was sustained, and the suit dismissed.

“The general principles which must control in determining whether a state enactment impairs the obligation of contracts have become so firmly established by the decisions of this court that any further discussion of their soundness would be inappropriate. It is only necessary to recall them, and then ascertain their applicability to the particular state legislation now alleged to be repugnant to the constitution of the United States.

“It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested rights in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies, or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract: *Green v. Biddle*, 8 Wheat. 1, 85; *Bronson v. Kinzie*, 1 How. 311, 317; *Planters' Bank v. Sharp*, 6 How. 301, 327; *Walker v. Whitehead*, 16 Wall. 314, 317; *Murray v. Charleston*, 96 U. S. 432, 438; *Edwards v. Kearzey*, 96 U. S. 595, 601; *Vance v. Vance*, 108 U. S. 514, 518, 2 Sup. Ct. Rep. 854; *McGahey v. Virginia*, 135 U. S. 685, 693, 10 Sup. Ct. Rep. 972; *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042; *McCullough v. Virginia*, 172 U. S. 102, 104, 19 Sup. Ct. Rep. 134. The decisions of the supreme court of Wisconsin as to what are to be deemed laws impairing the obligations of contracts are in harmony with the decisions of this court: *Lightfoot v. Cole*, 1 Wis. 26, 34; *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Paine v. Woodworth*, 15 Wis. 298; *Northwestern Mut. L. Ins. Co. v. Neeves*, 46 Wis. 147, 49 N. W. 832; *Lee v. Buckheit*, 49 Wis. 54, 4 N. W. 1077; *Rosenthal v. Wehe*, 58 Wis. 621, 17 N. W. 318.

“Having these principles in view, we proceed to inquire whether the revised charter of Oshkosh so changed existing remedies for the enforcement of contract rights against municipal corporations as to impair the obligation of the contract made in 1883 between the waterworks company and the city.

“By the act of the Wisconsin legislature revising and amending the charter of the city of Oshkosh, that municipal corporation was made capable of suing and being sued in all courts of law and equity: 2 Wis. Laws 1883, p. 687, c. 1, sec. 1. The same act provided that all moneys, credits, and demands of the city should be under the control of the common council, and ‘be drawn out only upon the order of the mayor and city clerk, duly authorized by the vote of the common council’: 2 Wis. Laws 1883, p. 724, c. 7, sec. 1. It was further provided that ‘any account or demand against the city, before acted on or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law, and any person who shall falsely swear to any such amount or demand shall be deemed guilty of perjury, and shall be punished according to law’: 2 Wis. Laws 1883, p. 726, c. 7, sec. 10.

“The supreme court of Wisconsin, in its opinion, states that, except for the above restrictions upon the payment of money, the city of Oshkosh was, in 1883, subject to be sued upon contract liability, like any private person or corporation.

“But by the city’s amended charter of 1891, certain changes were made, and the question is whether those changes, if applied to the contract of 1883, would impair its obligation: 2 Wis. Laws 1891, p. 321, c. 59.

“The revised charter retained substantially the above provisions in the charter of 1883, and the following, among other, additions, were made:

“ ‘Sec. 4. No action shall be maintained by any person against the city, upon any claim or demand, until such person shall first have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation thereof shall be deemed a disallowance thereof.

“ ‘Sec. 5. The determination by the common council, disallowing in whole or in part any claim, shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council, as in this act provided.

“ ‘Sec. 6. Whenever any claim against the city shall be disallowed in whole or in part by the common council, such person may appeal from the decision of such common council, disallowing said claim, to the circuit court of the county in which the city is situated, by causing written notice of such appeal to be served on the clerk of the city within twenty days after making the decision disallowing such claim; and by executing a bond to the city in the sum of one hundred and fifty dollars, with two sureties, to be approved by the

city attorney and comptroller, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant in the circuit court. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings had in the case before the common council, with its decision thereon, and shall transmit the same, together with all the papers in the case, to the clerk of the circuit [court] of the county. Such case shall be entered, tried, and determined in the same manner as cases originally commenced in such court; Provided, however, that whenever an appeal is taken from the allowance made by the common council upon any claim, and the recovery upon such appeal shall not exceed the amount allowed by the common council, exclusive of interest upon such allowance the appellant shall pay the costs of appeal, which shall be deducted from the amount of the recovery; and when the amount of costs exceeds the amount recovered, judgment shall be rendered against the appellant for the amount of such excess': 2 Wis. Laws 1891, p. 412, c. 21, sec. 6.

"It is not alleged in the complaint that the waterworks company, before commencing this action, presented its claim to the common council for allowance.

"The company contends that, if the above provisions are construed to mean what the supreme court of Wisconsin have declared similar provisions in other municipal charters to mean, then such burdens and restrictions have been imposed upon the enforcement of the contract with the city of Oshkosh as to impair its obligation. This suggestion renders it necessary to ascertain the import of those decisions.

"In *Drinkwine v. Eau Claire*, 83 Wis. 428, 430, 53 N. W. 673, it appeared that Drinkwine preferred a claim against the city of Eau Claire, which was disallowed by the common council. He appealed from that action of the council, and executed a bond which recited that he had appealed to the circuit court of Eau Claire county, and conditioned for the payment of all costs that should be adjudged against him by the court aforesaid, and not generally by the court, as prescribed by the statute. It was contended that the bond was insufficient, since, in the event of a change of venue in the case, the surety would not be bound by a judgment for costs in the court that actually tried the case. After referring to prior cases in that and in other courts, particularly to *Sharp v. Bedell*, 10 Ill. 88, in which it had been held that if an appellant failed to comply substantially with the requirements of the statute in relation to the perfecting of appeals, the circuit court did not acquire jurisdiction of the person of the opposite party or of the subject matter, and should dismiss the appeal, the supreme court of Wisconsin said: 'The liability of a surety is *strictissimi juris* and cannot be extended by implication. He had a right to stand on the exact words



of his contract. . . . The deviation from the statutory requirement is one of substance. The surety may have been quite willing to enter into the engagement to pay the costs, if the appellant should be defeated on a trial in Eau Claire county, in the city where the alleged cause of action arose, and quite unwilling to undertake for the payment of the costs, in like event, of a trial in a distant county, greatly increased by the travel of witnesses and the costs of subpoenaing them. A similar ruling in *Myres v. Parker*, 6 Ohio St. 502-504, sustains the conclusion at which we have arrived, that the bond under consideration is not a substantial compliance with the statute.' The ruling in the *Drinkwine* case was reaffirmed in *Oshkosh Waterworks Co. v. Oshkosh*, 106 Wis. 85, 81 N. W. 1040, and in other cases.

"In *Mason v. Ashland*, 98 Wis. 540-547, 74 N. W. 357, 359, it was held that, under the charter of the city of Ashland, the right of appeal from the disallowance of a claim by the common council was perfect at the expiration of sixty days from the filing of the claim with its clerk, and that the claimant 'was obliged to exercise it within the twenty days allowed by statute, or be forever barred from thereafter prosecuting his claim in any court'—citing *Fleming v. Appleton*, 55 Wis. 90, 12 N. W. 462, and *Koch v. Ashland*, 83 Wis. 361, 53 N. W. 674.

"In *Telford v. Ashland*, 100 Wis. 238, 75 N. W. 1006, it was adjudged that, as the objection to the appeal was not taken within twenty days after the adverse action of the council goes to the jurisdiction of the subject matter, it may be raised for the first time in the appellate court.

"In *Seegar v. Ashland*, 101 Wis. 515, 77 N. W. 880, it was held that under a provision in a city charter to the effect that in case any person presented his claim or demand against the city, which the common council disallowed in whole or in part, the council 'shall not again consider or allow such claim,' its failure to act upon a claim within sixty days after being presented was equivalent to a disallowance—the right to appeal therefrom expiring in twenty days after such disallowance.

"Accepting these decisions as our guide in determining the meaning and effect of the provisions in the revised charter of Oshkosh, we perceive no reason for holding that the change in remedies made by that charter impair, in the constitutional sense, the obligation of the contract of 1883 between the waterworks company and the city.

"The requirement that a claim or demand against the city should be presented to the common council and be disallowed, in whole or in part, before the city can be subjected to suit upon it, is a reasonable regulation for the protection of the city against the cost of unnecessary litigation. It does not affect the substance of the creditor's right, without being unreasonably delayed, to institute an

action against the city. It only stays his hand until the city has full opportunity to look into his claim before paying or refusing to pay it. Nor does the above regulation unduly obstruct the creditor; for by it the city is, in effect, allowed only sixty days for such examination, and the creditor is protected against a vexatious or indefinite delay by the provision that the failure of the council, for sixty days, to pass upon the claim shall be deemed a disallowance thereof, and the creditor may at once appeal to the circuit court of the county. In that court the necessary issues can be framed, under the direction of the court, and according to the usual modes of pleading, and the rights of the parties judicially ascertained and enforced.

"Equally without merit is the objection to that clause of the revised charter making the disallowance of a claim, in whole or in part, by the council, final and conclusive, unless an appeal be taken to the circuit court of the county within a prescribed time. We take it that the purpose of that provision was to protect the public against the dangers attending persistent and frequent applications to the common council after it had once acted, and to compel claimants to proceed with promptness while all the facts connected with their demands were fresh in the minds of the members of the council. This is a wholesome regulation, of which no creditor can justly complain, since the charter enables him, without serious delay, after the disallowance of his claim, to invoke the jurisdiction of a court of general jurisdiction for the enforcement of such claim.

"But it is earnestly insisted by the waterworks company that the provision requiring an appeal from the disallowance of a claim to be perfected within twenty days thereafter is so unreasonable, in the matter of time, as, by its necessary operation, to impair the obligation of its contracts with the city. We cannot assent to this view. The time within which the creditor must perfect his appeal is undoubtedly short. But it is sufficient for the purpose of enabling him to get his case, with reasonable dispatch, into the circuit court and have its judgment as to his claim against the city, with the same right that other litigants have to take the case into the highest court of the state. Here again is disclosed the purpose of the legislature to bring to a speedy conclusion all disputes as to claims against the city. It surely was competent for the legislature to effect such an object, and it cannot be said, as matter of law, that a provision requiring the creditor, within twenty days after the disallowance of his claim, to serve notice of appeal on the city clerk, materially affects or obstructs the presentation of his claim to the proper circuit court.

"Objection is also made to the requirement in the new charter that the appeal bond shall be approved by both the city attorney and comptroller. In support of that objection it is said that one or the other or both of those officers might be absent from the city at the

time the bond is tendered by the creditor; also, that one or both of them might object to the bond when he ought to accept it as sufficient. But these contingencies may never arise. They certainly have not arisen in respect of the claim of the waterworks company, for it is not alleged that the company ever presented its claim to the common council for allowance, and consequently had no occasion to tender the city attorney and comptroller an appeal bond. Besides, it is not at all clear that the revised charter requires, as a condition of the right to appeal, that a bond be executed by the creditor within twenty days after the disallowance of his claim by the common council. It does expressly require that the notice of appeal shall be served within that time on the clerk of the city, but no such absolute requirement is made as to the time within which the appeal bond must be executed. It may be that a construction that would defeat the creditor's appeal, because of the absence of the city attorney and comptroller, or either of them, at the time the bond is tendered for their approval, or a refusal to approve a bond that was sufficient, would make the revised charter, in its application to such a case, repugnant to the contract clause of the constitution. But no such case is now presented, and no such question as that suggested need now be decided. It should not be assumed that the right of appeal will be lost where the creditor has done all that was required in order to perfect his appeal. As the waterworks company does not allege that it presented its claim to the common council for allowance, it is not in a position to ask a judicial determination of a question that cannot arise in this case.

"Another objection remains to be noticed. It is founded on the decision in *Drinkwine v. Eau Claire*, 83 Wis. 428, 430, 53 N. W. 673, in which it was held that the appeal bond provided in the charter of Eau Claire must relate to costs as adjudged by the circuit court, and not by the circuit court of any named county. We have seen what were the reasons that governed the supreme court of Wisconsin in so interpreting a provision similar to the one here in question in the revised charter of the city of Oshkosh. If that interpretation was, as suggested, too technical, it would not follow that the charter thus construed would impair the obligation of contracts. It would be extraordinary if this court should hold the new remedies and modes of procedure provided by the revised charter to be illegal because of the possibility that a creditor might, by mistake or carelessness, execute a bond not conditioned, as required by that charter, for the payment of the costs adjudged by the circuit court, generally, but by a named circuit court.

"As to the contention that the obligation of the contract of August 31 1891, was impaired by the revised charter, it is sufficient to say that the charter went into operation March 23, 1891. The contract of 1891 was a new contract, independent of that of 1883, and the

waterworks company could not, therefore, say that its obligation was impaired by a statute in force at the time the contract was made. The contract clause of the constitution of the United States has reference only to a statute of a state enacted after the making of the contract whose obligation is alleged to have been impaired: *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391, 7 Sup. Ct. Rep. 916; *Pinney v. Nelson*, 183 U. S. 144, 147, 22 Sup. Ct. Rep. 52; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 351, 22 Sup. Ct. Rep. 691. If, however, the agreement of 1891 had such connection with that of 1883, that they may be regarded as one agreement, then what has been said as to the application of the revised charter to the contract of 1883 applies, in all respects, to that of 1891. The obligation of neither contract was impaired by the charter of 1891.

"We have noticed all the points that require consideration, and adjudge, therefore, that the changes made by the revised charter of Oshkosh, in respect of remedies for the enforcement of claims against that city, provided for its creditors a substantial and adequate remedy, and therefore did not impair the obligation of contracts with that municipal corporation.

"The judgment of the supreme court of Wisconsin must be affirmed.

"It is so ordered."

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*The Legislature Has Power* to enlarge, limit, alter, or repeal remedial statutes, provided contracts are not impaired, and a remedy is left, though less convenient and prompt, than the one so changed or repealed: *Kirkman v. Bird*, 22 Utah, 100, 83 Am. St. Rep. 774, 61 Pac. 338; *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022; *Mattson v. Astoria*, 39 Or. 577, 87 Am. St. Rep. 687, 65 Pac. 1066; *State v. Heldenbrand*, 62 Neb. 136, 89 Am. St. Rep. 743, 87 N. W. 25. But if the effect of legislative action is to impair the obligation, it is void; and it is immaterial whether the result is accomplished by acting on the remedy, or directly on the contract itself: *Beverly v. Barnitz*, 55 Kan. 466, 49 Am. St. Rep. 257, 40 Pac. 325. Any law which in its operation amounts to a denial or obstruction of the rights accruing by contract, though professing to act only on the remedy, is unconstitutional: *Merchants' Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481. A law which so effects a pre-existing remedy as to substantially impair or lessen the value of a contract is forbidden by the federal constitution: *Skinner v. Holt*, 9 S. Dak. 427, 62 Am. St. Rep. 878, 69 N. W. 595.

*Charter Provisions* similar to those involved in the principal case are applied in *Morrison v. Eau Claire*, 115 Wis. 538, post, p. 955, 92 N. W. 280. See, too, *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212, 45 Pac. 356; note to *Commissioners v. Heaton*, 55 Am. St. Rep. 203-210; *Barrett v. Mobile*, 129 Ala. 179, 87 Am. St. Rep. 54, 30 South. 36.



## STATE v. FROEHLICH.

[115 Wis. 32, 91 N. W. 115.]

**CONSTITUTIONAL LAW.—Internal Improvements,** as the words are used in a constitutional provision against the state being a party thereto, include those things which might be expected to be undertaken for profit or benefit to the property interests of the private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government. (p. 896.)

**CONSTITUTIONAL LAW.—Internal Improvements.—Levees or Dikes** to restrain the waters of a navigable river are, prima facie, works of internal improvement, within the meaning of a constitutional prohibition against the state being a party to such improvements, whether the main purpose be promotion of navigability, creation of water power, or reclamation of lands. (p. 898.)

**CONSTITUTIONAL LAW.—Internal Improvements.**—The fact that levees to restrain the waters of a river might incidentally avert possible peril to life cannot make them other than works of internal improvement to which the state by a constitutional provision is prohibited from being a party. (p. 899.)

**CONSTITUTIONAL LAW.—Police Power.**—An act which the constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation, but for such prohibition. (p. 900.)

By chapter 282, Laws of 1901, an appropriation was made "for constructing and strengthening the levy system already existing in the vicinity of Portage on the Wisconsin river in Columbia and Sauk counties." A commission appointed to have charge of the work incurred a bill for which the Secretary of State refused to draw and issue warrants on the ground of the unconstitutionality of the legislation, whereupon mandamus was brought to compel their issue. From a judgment commanding the secretary to issue the warrants, he takes this appeal.

Attorney General, for the appellant.

H. W. Chynoweth and W. S. Stroud, for the respondents.

35 DODGE, J. This case presents for consideration and decision, not the inherent limits of the general power of appropriation of public moneys conferred upon the legislature in the grant of the legislative power, nor the inherent limits of the general power to provide for good government of the state,

for the protection of the "lives, limbs, health, comfort, good order, morals, peace and safety of society" (State *v.* Heine-mann, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818), called the "police power," but, instead, presents the question whether, waiving discussion of the extent of such powers as a general proposition, the legislature is expressly forbidden to enact legislation such as that before us. The prohibition relied on is section 10, <sup>36</sup> article 8, of the constitution: "The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works." That by the appropriation of money, to be expended by a state commission in certain work, the state is made "a party in carrying on such work," cannot be doubted. Indeed, that is not questioned, but only whether the construction of the proposed system of levees is a work of "internal improvement," within the meaning of this constitutional inhibition. The words themselves are capable of including substantially every act within the scope of governmental activity which changes or modifies physical conditions within the limits of the commonwealth; but, as the purpose of the constitution was to form a government (preamble), we must presume that these words were used in sufficiently limited sense to permit the accomplishment of that fundamental purpose, at least to a reasonable extent. That some limitation of the broad meaning was intended has been recognized by all branches of the government and by the people, in the unchallenged provisions for state capitol, university, schools for blind, deaf, and feeble-minded, hospitals, penitentiaries and the like, and for extensive works in improvement of the grounds appurtenant thereto. On the other hand, we cannot doubt the use of these words in a sense to exclude works which, but for the prohibition, might have been within the legitimate field of state government—works having at least some measure of public and governmental purpose—else the prohibition would have been needless.

The history of the federal and state governments during the quarter century preceding our constitutional convention seems to throw much light on the reason for the presence of this section in our constitution, and on the meaning of the words used therein. From about 1820 there had been vigorous debate and partisan difference over the propriety of a federal policy of construction of "internal improvements" within the several states, among the concrete illustrations of <sup>37</sup> which toll roads and canals were most prominent; but other facilities

of commerce and navigation, such as improvements to harbors and navigable streams, were present. Several of the states (notably, New York, with its Erie Canal) had undertaken similar works (some of them with great success) in development of their resources, settlement of their territory, and promotion of prosperity for their citizens, as also even in promise of actual profit to the state treasury from operation of the land and water highways, which had come to include steam railroads. In 1835, when the state of Michigan was carved out from territory of which Wisconsin was also a part, popular sentiment was enthusiastically favorable to governmental activity in this direction, and the new state government was commanded: "Internal improvements shall be encouraged by the government of this state; and it shall be the duty of the legislature, as soon as may be, to make provision by law for ascertaining the proper objects of improvements, in relation to roads, canals, and navigable waters": Const. Mich. 1835, art. 12, sec. 3; American Commonwealths (Mich., Cooley), p. 280.

This behest was promptly and vehemently obeyed. Very shortly thereafter the bubble hope of direct profit to the state treasury from the governmental ownership and operation of such enterprises collapsed in the blast of one of those greatest of educators in political economy—a financial panic; and, in the ten years intervening before our own constitutional discussions, the pendulum of popular sentiment had swung to the extreme of opposition to a policy such as Michigan had first adopted. In 1846 the first constitutional convention of Wisconsin included an article as follows (Journal of Convention, p. 219): "This state shall encourage internal improvements by individuals, associations and corporations, but shall not carry on, or be a party in carrying on, any work of internal improvement"; the words "by individuals, associations and corporations" having been inserted <sup>38</sup> in course of the deliberations. Though the constitution was defeated by the people, this section met with great and general approval. It was said by Mr. Estabrook to have been "as the precious jewel in the head of the toad." In the convention of 1847, which framed the present constitution, the clause from the former which directed encouragement of internal improvements by private enterprise was at first reported, but afterward dropped out, and that prohibiting the incurring of any indebtedness therefor was inserted. The debates make entirely clear, however, that the choice made was between the policy of permitting govern-

mental construction of "internal improvements," and that of leaving them to come by private enterprise. The same choice was obvious in Michigan, when in 1850 the people reversed the policy commanded by the constitution of 1835, and adopted a prohibitory section substantially like our own. Nowhere in the discussion, however, can be found anything in denial of the desirability to the community of the existence of internal improvements.

There cannot be doubt that this quarter century of vehement discussion had produced a fairly definite conception of what had come to be designated "internal improvements," which either the government was to undertake, or was to leave to private enterprise, according as one policy or the other prevailed. We think it clear that such conception included those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government. Of course, this line of classification does not exclude possibility that the dominant characteristics of one class may be present in illustrations of the other. A toll-earning canal which gathers spreading waters within its banks may promote public health, as also may a drainage <sup>39</sup> system undertaken for improvement of the lands of those who construct it. Improvement of the grounds of a state institution may improve access to, and enhance the value of, private property. But in each case the dominant purpose is obvious, and therefore the classification along the line of distinction above stated.

The decided cases generally in their facts support the foregoing conception and distinction, although not always stating it accurately. Thus, in *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331, in holding that a statute authorizing the state railway and warehouse commission to erect and run elevators infringed the constitutional provision, the court overruled a contention that it merely facilitated a legitimate police purpose of regulating the weighing and storing of grain; also that "internal improvements" meant only channels of travel and commerce. The first contention was overruled on the ground that building an elevator could have no relation to police regulation of weighing and storing grain—a position to which we should hesitate to assent. A more conclusive



answer to the police power argument would obviously have been that if the work was one of internal improvement, within the constitutional meaning, it was forbidden, although it might facilitate execution of a police power and purpose. In disposing of the latter contention (that works of internal improvement included only means of travel and transportation), the court said (Mitchell, J., *Rippe v. Becker*, 56 Minn. 117, 57 N. W. 335), that it included "any kind of work that is deemed important enough for the state to construct," except, of course, as indicated in *Leavenworth Co. v. Miller*, 7 Kan. 479, 493, 12 Am. Rep. 425, those which are used exclusively by and for the state, as a sovereign, in the performance of its governmental functions, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like; for education, the prevention of crime, charity, and the preservation of public health are all recognized functions of state government."

<sup>40</sup> In other cases the expression "works of internal improvement," contained in constitutional prohibitions similar to ours, have been declared to include enterprises as follows: Dredging sand flats from a river (*Ryerson v. Utley*, 16 Mich. 269); deepening and straightening river (*Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549); constructing or operating street railways (*Attorney General v. Pingree*, 120 Mich. 550, 79 N. W. 814); telephone or telegraph lines (*Northwestern Tel. Exch. Co. v. Chicago etc. R. R. Co.*, 76 Minn. 334, 345, 79 N. W. 315); irrigation reservoirs (*In re Senate Resolution*, 12 Colo. 287, 21 Pac. 484); roads, highways, bridges, ferries, streets, sidewalks, pavements, wharves, levees, drains, waterworks, gasworks (obiter, *Leavenworth Co. v. Miller*, 7 Kan. 479, 493, 12 Am. Rep. 425); levees (*Alcorn v. Hamer*, 38 Miss. 652); improvement of Fox river (*Sloan v. State*, 51 Wis. 623, 632, 8 N. W. 393); levees and drains (*State v. Hastings*, 11 Wis. 448, 453). It also appears by the relation in this case that the original construction of the system of levees, to which those now contemplated are to be supplementary, was done both by this state and by the United States as a work of internal improvement, and by the municipalities for reclamation and improvement of property: See Laws 1873, c. 213; Laws 1889, c. 434; and *Barden v. Portage*, 79 Wis. 126, 132, 48 N. W. 210.

In the light of the historical situation surrounding the framing of our constitution, and of the construction, both

practical and judicial, since given, we cannot doubt that, *prima facie*, levees or dikes to restrain the waters of a navigable river are works of internal improvement, within the meaning of the prohibitory section invoked by the attorney general: and that, too, whether the main purpose be promotion of navigability, creation of water power, or reclamation of adjoining lands. In any of these there is enough of pecuniary benefit to warrant belief in the possibility, at least, that they may be undertaken by private enterprise or local <sup>41</sup> associations. Indeed, a part, at least, of the system which the act of 1901 proposes to construct and strengthen, was the result of the private enterprise of the Green Bay and Mississippi Canal Company, subsequently taken over by the United States. On the other hand, even though there be some slight measure of general governmental purpose likely to be accomplished by such structures, it is so indirect and relatively so slight that it cannot take the work out of the category to which it so obviously belongs. Railway and toll-road building is forbidden to the state, yet each facilitates the moving of militia and the transportation of supplies for the state institutions. Removal of dangerous rapids from a navigable river would tend to protect life, yet the authorities hold it a prohibited internal improvement, no matter how fully the legislature may have been impressed with the desirability of the improvement for the life-saving purpose. For the same reason the fact that levees at the place in question might incidentally avert possible peril to life cannot make them other than works of internal improvement, nor can the declaration of such a purpose in the title of the act be any more effective to that end.

At this point the relator presents the argument that in protection of life and property, or otherwise, there may be found a public purpose in the construction of the proposed levees, whereby they are brought within the police power of the legislature. This may well be conceded *arguendo*, without changing the result. Important public and general interests may be, doubtless are, subserved by railroads, canals, street railways, and telegraphs; else the state's right of eminent domain could not be conferred in their aid. But that fact does not prevent them from being works of internal improvement, forbidden to the general state government. It is on the ground that such works do serve a public purpose, and are within the ordinary police powers conferred by the general vesting of leg-

islative power, that it has been held that <sup>42</sup> the legislature may delegate to counties and municipalities authority to aid them by loans of credit: *Bushnell v. Beloit*, 10 Wis. 195; *Rogan v. City of Watertown*, 30 Wis. 259. But that result is reached only because the prohibition contained in section 10, article 8, of the constitution, applies only to the general state government, and not to the minor political divisions. Concede the state government has the police power and that such works fall within it; nevertheless the state is prohibited from exercising that power by means of works of internal improvements. The police power has been wittily defined as the power to pass unconstitutional laws, and some utterances of courts have seemed to justify such conception. It is nevertheless erroneous. An act which the constitution clearly prohibits is beyond the power of the legislature, however, proper it might be as a police regulation but for such prohibition. Sectarian instruction cannot be given in public schools, however promotive of public morals the legislature may deem it: *State v. District Board*, 76 Wis. 177, 20 Am. St. Rep. 41, 44 N. W. 967. No law impairing the obligation of contracts may be enacted, however essential to the peace of the community: *Cornell v. Hichens*, 11 Wis. 353. The full extent to which the courts may go in their construction is to recognize that constitutions are adopted for the purpose of establishing government, to which end some measure of police power is essential, and that a construction of any provision which would wholly prevent the accomplishment of that purpose is to be presumed against, if any other reasonable one can be found which is consistent with the existence of government. It is upon this ground that this and other courts have ascribed a limited meaning to the words "internal improvements," but, after finding what that meaning is, we cannot sustain the state government in being a party to them without nullifying the behests of the sovereign people, pronounced in the highest form of written law. Being convinced, as already stated, that their true meaning is such as to include the work <sup>43</sup> authorized by chapter 282, Laws of 1901, we must hold that the legislature was forbidden to enact such chapter into law, and that the secretary of state is neither required nor empowered to issue warrants for expenses incurred under it.

By the Court. Judgment reversed, and cause remanded with directions to dismiss the proceedings.

A *State Constitution* providing that the state shall never be a party in carrying on any work of internal improvement is not a restriction upon municipal corporations: *Commissioners of Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425.

*The Police Power* must be exercised in subordinancy to the constitution: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 237.

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## ROGERS-RUGER COMPANY v. MURRAY.

[115 Wis. 267, 91 N. W. 657.]

### CONSTITUTIONAL LAW—Log Liens—Purchaser's Liability.

A statute declaring that any person who buys an interest in property upon which a log lien is claimed, and uses or so disposes of the property that the lien cannot be enforced, renders himself liable for the entire debt due the lien claimant, is unconstitutional. (p. 902.)

H. V. Gard, for the appellant.

Catlin, Butler & Lyons, for the respondent.

**268** BARDEEN, J. This action involves the validity of section 3336 of the Statutes of 1898. Such section is as follows: "If any property upon which a lien is claimed under the foregoing provisions shall, during the pendency of the claim therefor, be transported out of this state, secreted, destroyed, sold, encumbered or so changed in character by intermingling it with other property as to prevent the property upon which the lien is claimed from being subjected to the satisfaction of the lien, the owner of such property and every purchaser thereof or person acquiring any interest therein during the pendency of such claim shall be liable to the lien claimant for the amount which may be adjudged to be due him, which amount may be recovered against any such person in a personal action; provided the petition for lien is filed in accordance with law and an action to foreclose the same is begun within the time limited therefor."

It will be observed from the complaint that the plaintiff has complied with the requirements of this statute, and is seeking to recover from defendant the entire amount of time checks it has purchased. According to the literal reading of the statute, any person who buys an interest in property upon which a log lien is claimed, and uses or so disposes of the property



**269** that the lien cannot be enforced, renders himself liable for the entire debt due the lien claimant. It is also to be observed that this extreme liability is not made to rest upon the fact that a lien has been adjudged and determined, but may be declared in any case where a lien is claimed, a petition filed, and action commenced. The good faith or diligence of the person purchasing the property is no protection to him. The lumber may be sold in open market, it may pass through many different hands, it may go into the possession of innocent purchasers, and yet the original owner, and every person acquiring any interest therein "during the pendency of such claim," is liable to the lien claimant for the full amount of his due, regardless of the value of the property which may have come to his hands. The value of the property received by the purchaser may be infinitesimal when compared with the amount due the claimant. In this case it was about one-fifth. For the simple act of purchasing personal property the statute makes the purchaser liable with the real debtor to the extent stated. The lien claimant need not exhaust his remedy against the real debtor. He need not have the amount due determined in the suit brought against the party primarily liable. He has only to file his lien, and commence a suit, and then the liability of the other becomes absolute.

Is this a valid enactment? Does it do violence to that provision of the federal constitution which provides that "no state shall . . . deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws": Fourteenth Amendment, sec. 1. That it imposes upon the purchaser of any of the commodities upon which the statute gives a lien a penalty if he purchases during the pendency of such claim is perfectly obvious. It thrusts upon such purchaser an obligation having no relation to the value of the property he receives or the loss which the lien claimant sustains. It may be a just and proper thing for the legislature to protect the lien claimant **270** against acts that tend to defeat his lien. Indeed, it may go farther, and pass statutes which shall be read into the contracts of the parties when made, and date the inception of the lien from the commencement of the operations which give rise to the lien. Such legislation was sustained in the cases of *Lampson v. Bowen*, 41 Wis. 484; *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607, 51 Am. St. Rep. 925, 65 N. W. 488; *J. B. Alfsee Mfg. Co. v. Henry*, 96 Wis. 327, 71 N. W. 370; and

Fitzgerald v. Walsh, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717. This principle was carried to its limit in Mallory v. La Cross Abattoir Co., 80 Wis. 170, 49 S. W. 1071, which sustained the subcontractor's lien under chapter 333, Laws of 1889, on the theory that such law made the owner a surety for the original contractor for the payment of work which resulted in the improvement of his property. This statute was to be read into the contract of the original parties, and could be sustained, because it gave the property owner a remedy over in case he was compelled to pay more than the amount called for in his contract. The statute under consideration contains no such provision. It gives the purchaser no remedy, while it imposes a burden beyond the contemplation of the parties. It is the imposition of the penalty mentioned that makes the law vicious. Because it is arbitrary, unjust and oppressive, because it creates a liability having no just relation to the loss sustained by the lien claimant, or benefits received by the purchaser, it comes fairly within the condemnation of the federal constitution.

Much judicial thought has been expended in interpreting the meaning of the section of the fourteenth amendment mentioned, and many cases have arisen in which the learning of the judges have been displayed. All agree that the legislature cannot take the property of one and give it to another. It cannot create or enforce penalties, except in the exercise of the police power or for the general welfare of the people. Legislation that is so partial and arbitrary as to result in the spoliation of property has always been condemned. In fact, <sup>271</sup> the range of decision has been so wide, and the cases so numerous, that an attempt at citation of authorities would result in confusion.

Counsel for the appellant, while not admitting the invalidity of the statute, argue that it can be sustained by holding that it was only intended to make the purchaser liable for the actual value of the property received, and that the statute may be so construed. No canon of construction of which we are aware sanctions this contention. In words as plain as any that could have been selected, the legislature has manifested its intention. The language is that the party "shall be liable to the lien claimant for the amount which may be adjudged to be due him." The construction contended for would make the statute read "shall be liable to the lien claimant for the value of the property received by him." This court can only

construe. It cannot legislate. Words should not be read into or read out of a plain statute. To adopt the construction asked would be to make a new statute. This we cannot do. It must be left as written by the legislature, and its terms, being in violation of the organic law, must be held invalid.

Plaintiff having no basis for its alleged cause of action, the demurrer was properly sustained.

By the Court. Order affirmed.

CASSODAY, C. J. I concur in the decision in this case, but in doing so I do not wish to be regarded as approving the decision of this court in *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071, or *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607, 51 Am. St. Rep. 925, 65 N. W. 488, cited in the opinion of my brother Bardeen.

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*As to Liens Upon Logs*, timber and lumber, see *Anderson v. Tingley*, 24 Wash. 537, 85 Am. St. Rep. 959, 64 Pac. 747; *Edwards v. H. B. Waite Lumber Co.*, 108 Wis. 164, 81 Am. St. Rep. 884, 84 N. W. 150; *Breault v. Archambault*, 64 Minn. 420, 58 St. Rep. 545, 67 N. W. 348; *Baleom v. Empire Lumber Co.*, 91 Ga. 651, 44 Am. St. Rep. 58, 17 S. E. 1020; *Littlefield v. Morrill*, 97 Me. 505, 94 Am. St. Rep. 513, 54 Atl. 1109.

*A Mechanic's Lien Law* which gives to contractors, subcontractors, materialmen, and laborers a lien on buildings for which they have furnished material or performed labor, is not unconstitutional: *Bartlett v. Millikan*, 156 Ind. 510, 83 Am. St. Rep. 220, 60 N. E. 310.

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## JERDEE v. FURBUSII.

[115 Wis. 277, 91 N. W. 661.]

**HOMESTEAD—Alienation by Husband.**—A statute declaring that no alienation of his homestead by a married man shall be of any effect without the signature of his wife, does not preclude him from conveying an equitable right to the legal title to lands used as a homestead for himself and wife at the time of the conveyance, upon the extinguishment of the homestead right by her death or otherwise. (p. 909.)

Sanborn, Luse & Powell, for the appellant.

W. M. Bowe, for the respondent.

278 MARSHALL, J. Action for specific performance. The complaint, by appropriate allegations, set forth the following:

Daniel F. Smith, a married man, living separate and apart from his wife, and the owner of a homestead in this state upon which he resided in 1892, for a valuable consideration, in form by warranty deed, conveyed such homestead to Henry B. Dike and plaintiff. Smith's wife refused to join in the deed. Subsequently they died, he surviving her about two years. Before the commencement of this action Dike conveyed his interest in the land to plaintiff. Smith left surviving him but one child, the person named as defendant. The deed, though void as a conveyance of the legal title, was good as a contract to convey after the extinguishment of the homestead right of the grantor and his wife. Such homestead was extinguished by their death, and the legal title in the land became vested in the defendant, in trust, however, for the equitable owner, under the deed. The prayer of the complaint was, in effect, for a decree declaring the deed good as an agreement to convey upon the extinguishment of the homestead right; that such right was extinguished by the death of Smith and his wife; that plaintiff was entitled to have the contract specifically performed by a conveyance from defendant, and to a decree requiring the making of such conveyance accordingly.

Defendant interposed a general demurrer to the complaint, which was sustained, and plaintiff appealed.

The question presented here may properly be stated thus: Does section 2203 of the Statutes of 1898, in terms providing that no mortgage or other alienation by a married man of his homestead, exempt by law from execution, shall be valid or of any effect as to such homestead without the signature of <sup>279</sup> his wife, deal merely with the homestead as a privilege, right, or interest in land, enabling the persons whom the statute was designed to protect to enjoy the property as a home, leaving the husband free to deal with it in any way he may see fit not inconsistent with the homestead right? We cannot, at this late day, decide that as a new question. If it were otherwise, a different result of this appeal might occur than the one we have decided upon. In *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 395, it was in effect held that the statutory disability of the husband goes only to such dealings with the land used as a homestead as interferes with such use, and that a deed executed by him alone, construed as a contract to convey after the extinguishment of the homestead right, does not so interfere. In *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420, the court attempted to carefully consider section 2203 of the Statutes of



1898, and all arguments that could reasonably be advanced, based upon other statutes relating to the subject of homestead, in support of the theory that the disability of the husband under such section goes to the entire property in the land, legal and equitable, resulting in a decision in favor of the affirmative of the question we have stated, that is, that such section uses the term "homestead" as descriptive of a right in land, a privilege to use it as a home, and that an equitable interest therein may be conveyed by the sole act of the husband, an interest entitling the grantee to the legal title to the land upon the termination of the homestead privilege. It was said that the statute must be construed as preventing him from conveying the legal title in presenti, or conveying a future estate in fee simple, because such an interest would enable the owner thereof to seriously prejudice the enjoyment of the homestead right; but that the mere conveyance of an equitable interest, enabling the vendee to call for the legal title upon the termination of the homestead right, does not have that effect. In that the court followed judicial decisions made under statutes more or less similar to ours (*Jewett v. Brock*, 280 32 Vt. 65; *Whiteman v. Field*, 53 Vt. 554; *Gee v. Moore*, 14 Cal. 476; *McQuade v. Whaley*, 31 Cal. 533; *Smith v. Provin*, 4 Allen, 516; *Doyle v. Coburn*, 6 Allen, 71; *Stewart v. Mackey*, 16 Tex. 56, 67 Am. Dec. 609) in preference to decisions to the contrary under like statutes (*Phillips v. Stauch*, 20 Mich. 369; *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374; *Barton v. Drake*, 21 Minn. 299; *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817; *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842; *Alford v. Lehman, Durr & Co.*, 76 Ala. 526; *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433). The former authorities are to the effect that a married man may make a good conveyance of the legal title to land affected by the homestead right, subject to the enjoyment of such right. This court did not go quite that far, as we have seen, holding that the farthest the husband can go, acting alone, is to make an executory contract binding the legal title in equity upon the satisfaction of the homestead privilege, and that a conveyance in form conveying the legal title should be given effect only as a conveyance of such equitable interest.

Many courts have gone so far as to hold that such a contract is not good for any purpose whatever; that the vendee therein can neither obtain the legal title to the premises under it in any situation, nor maintain an action against the vendor to

recover the consideration paid. One of the most significant of such cases is *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817. However, the idea that the homestead which the husband cannot convey except in the manner indicated in section 2203 is a mere right in land, and that the creation of an equitable right to the legal title, upon the termination of the homestead privilege, does not interfere with the latter interest and therefore may be created, was ingrafted upon and made a part of our statute, section 2203, as we have indicated, and the decisions of this court, in every instance where the subject has come up since that time, have been in harmony therewith: In *re Root's Will*, 81 Wis. 263, 267, 51 N. W. 435; *Whitmore v.* <sup>281</sup> Hay, 85 Wis. 240, 39 Am. St. Rep. 838, 55 N. W. 708; *Town v. Gensch*, 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893. The law has thus stood for nearly a quarter of a century, and whether the court's construction of the statute was right or wrong it must now be considered the law the same as if the idea involved were literally expressed in the statute. It relates to property. It has become, by the lapse of time, a rule of property, which, by well-settled principles, can only be rightly changed by legislative enactment. That branch of the government has had ample opportunity to consider the subject, and though the statutes have been carefully revised in recent years, no attempt has been made to change the nature of the statutory homestead as declared by this court. It may be that the statutes ought to be changed so that the meaning of the term "homestead," where it occurs in the exemption clause, which unquestionably covers the whole title to the land, will be unmistakably identical with the homestead which the husband cannot alienate without the consent of his wife in the manner indicated in section 2203, and with the homestead which, under section 2271 of the Statutes of 1898, if the owner dies not having fully devised the same, descends free from all judgments or claims against him except as therein indicated, to the end that all conveyances by a married man of his homestead or any interest therein, legal or equitable, present or future, by deed or otherwise, without his wife's consent, evidenced by her act of joining in the deed, shall be of no effect whatever. It seems that nothing short of that will efficiently preserve the property chosen by the husband for the family home, for the benefit of himself and family, till such time as he sees fit to abandon it as such.

It follows from what has been said that *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 395, and *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420, rule this case. To try to distinguish one case from another upon the facts, where the ruling principles in one are plainly identical with those <sup>282</sup> in the other, creates uncertainty and confusion in the law. That should be avoided, as to any subject, but particularly in respect to titles to real property. True, as counsel contends, in *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 395, the wife intended to sign a deed conveying the homestead lands, but by mistake other lands were described in the paper, while in this case the wife refused to sign the deed. But the decision went solely upon the ground that the statute deals only with a homestead right in land, and that the wife's signature is not essential to a conveyance of an interest in the land which does not disturb such right. The principles of law upon which a decision is based are necessarily a part of the decision: *Case v. Hoffman*, 100 Wis. 314, 318, 75 N. W. 945; *Wells' Adjudicata*, sec. 217; *Trustees v. Stocker*, 42 N. J. L. 115. There can be no mistaking the significance of this language in the *Conrad* case: "The deed of 1863, executed by John Felton and wife to the defendant Schwamb, although it did not convey the land intended, must be treated in equity as an executory contract by John Felton to convey such land. While the land intended to be conveyed remained the homestead of Felton and wife, the defendant could not have enforced specific performance of such executory contract. . . . But it was undoubtedly a valid contract, for the breach of which Felton would probably have been liable to respond in damages to Schwamb. . . . No good reason is perceived why Schwamb might not have maintained an action for specific performance of such contract against John Felton, whenever it was in the power of Felton to convey the land bargained for."

No significance is given, it will be seen, to the mere fact that the wife assented to the making of the deed. The law was declared the same as it would have been had the wife not been a party to the transaction at all. The idea expressed is that the homestead right of the statute under section 2203 is one thing, and the land subject to that right another, and that it is the former interest in the realty to which the disability of the husband relates. That was brought out with unmistakable <sup>283</sup> clearness in the later case of *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420, as we have seen.

In the light of the foregoing we cannot escape the conclusion that our statute, section 2203, as we are bound to view it at this time, does not preclude a married man, by deed or contract executed by him alone, from conveying an equitable right to the legal title to the lands used as the homestead for himself and wife at the time of such conveyance, upon the extinguishment of the homestead right by the death of the wife or otherwise; and that the deed in question in this case must be held good as such a conveyance and enforced against respondent, who became possessed of the legal title to the homestead lands upon the death of her father. That requires a reversal of the order appealed from.

By the Court. The order appealed from is reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings according to law.

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#### **THE EFFECT OF A CONVEYANCE OR ENCUMBRANCE OF THE HOMESTEAD BY ONE ONLY OF THE SPOUSES.\***

##### **I. Absolute Conveyances.**

- a. The General Rule.
- b. The Minority Rule.
- c. Compliance with Statutory Requirements.
- d. North Carolina Rule.
- e. Must not Trench Upon the Homestead.
- f. Former Alabama Rule.

##### **II. Mortgages and Deeds of Trust.**

- a. Generally.
- b. Effect of the Adoption of Constitutional Provisions.
- c. Equitable Mortgage.
- d. Under Trust Agreement.
- e. Third Person May Take Advantage.
- f. Validity as to the Excess.

##### **III. Change or Renewal in Mortgage.**

- a. Both Must Join Therein.
- b. Husband Alone Extending the Statute of Limitations.
  1. Authorities Allowing It.
    - A. Depending on Nature of the Homestead Right.
    - B. Depending on Nature of the Statute of Limitations.
  2. Authorities Opposed Thereto.

##### **IV. Surrender and Assignment of Instrument Under Which the Homestead is Held.**

- a. Certificates of School Lands.
- b. Lease or Contract.
- c. Assignment for Benefit of Creditors.

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\*REFERENCE TO MONOGRAPHIC NOTE.



- V. For Public Purposes.
  - a. Dedication.
  - b. Eminent Domain.
- VI. Title by Descent.
- VII. To What Extent Invalid.
- VIII. Validating Conveyance by Subsequent Act.
  - a. By Miscellaneous Acts.
  - b. By Abandonment.
- IX. Estoppel.
  - a. Applicability of the Doctrine.
  - b. Effect of Covenants in Conveyances.
- X. Excess Above Homestead.
- XI. Conveyance by One Spouse to the Other.
  - a. Generally Held Good.
  - b. Conveyance to Wife and Children.
  - c. Rule in Illinois — In Texas.
- XII. Leases.
  - a. Prohibited Where Homestead Interfered With.
  - b. Estoppel in Leases.
  - c. Covenant in Leases.
- XIII. Rights of Way.
  - a. View Allowing Grants Thereof.
  - b. Criticism of the Rule.
- XIV. Contracts to Convey.
  - a. Same as Conveyances.
  - b. When Homestead Character Lost.
  - c. Wife's Refusal to Join, as a Defense.
  - d. Defective Conveyances as Contracts to Convey.
- XV. Conveyance of the Reversion.
- XVI. Exceptions to the Rule Requiring Joinder of Husband and Wife.
  - a. For Purchase Money.
  - b. Prior Equities and Encumbrances.
- XVII. Voluntary Consent of the Wife.
  - a. Compliance With Statutory Requirements.
  - b. In Writing.
  - c. How Manifested.
    - 1. Signature Alone Sufficient.
    - 2. Must be in Body of Deed.
  - d. Fraud and Misrepresentation.
    - 1. By Third Person.
    - 2. By Grantee or Mortgagee.
  - e. Mistake or Ignorance.
  - f. Mere Relinquishment of Dower.
  - g. Necessity for Joint Assent.
    - 1. Must Exist.
    - 2. Separate Instruments.
  - h. Effect of Separation of Husband and Wife.
    - 1. Consent Still Necessary.
    - 2. Where Joinder Required Only if Living Together.
  - i. Effect of Insanity of One of the Spouses.
  - j. Power of Attorney.

1. By One Spouse to the Other.
2. To a Third Party.

k. Ratification.

l. Necessity for Consideration.

**XVIII. Constitutionality of Statutes Restricting Alienation of Homesteads.**

**XIX. Acknowledgment.**

a. Importance of Statutory Requirements.

b. Strict Compliance Necessary.

c. Relinquishment of Dower Therein.

d. Privy Examination.

1. In General.

2. The Alabama Rule.

e. Disqualification of Officer.

1. Where Pecuniarily Interested.

2. Acting Out of His County.

f. New Acknowledgment.

1. May Cure Defective Acknowledgment.

2. Made After Husband's Death.

g. Impeaching Officer's Certificate.

h. Estoppel in Acknowledgments.

**I. Absolute Conveyances.**

a. **The General Rule.**—It is well settled under the statutes in a large majority of the states that the alienation of a homestead by one only of the spouses is invalid, and passes no title to the alienee. While, to a great extent, the result of statutory enactment, this view is much favored on account of the beneficent character and purposes of the homestead laws. "Exemption is not intended merely as a boon to the head of a family. It has a broader purpose. It proposes to secure to the resident and his family a home and a shelter, of which they cannot be deprived by the visitations of adversity, or by the demands of creditors. It provides alike for the family, while the head of it is living, and for the widow and children, composing the family after his death": *Miller v. Marx*, 55 Ala. 322.

A conveyance of the homestead property by one of the spouses without the consent of the other was held void in the following cases, which represent the weight of authority: *Halso v. Seawright*, 65 Ala. 431; *Marks v. Wilson*, 115 Ala. 561, 22 South. 134; *Park v. Park* (Ark.), 72 S. W. 993; *Dunn v. Tozer*, 10 Cal. 167; *Clarkin v. Lewis*, 20 Cal. 634; *Myrick v. Bill*, 5 Dak. 167, 37 N. W. 369; *Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033; *Marshall v. Barr*, 35 Ill. 106; *Richards v. Greene*, 73 Ill. 54; *Gray v. Schofield*, 175 Ill. 36, 51 N. E. 684; *Burnap v. Cook*, 16 Iowa, 149, 85 Am. Dec. 507; *Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 Pac. 199; *Hill v. Alexander*, 2 Kan. App. 251, 41 Pac. 1066; *Fisher v. Meister*, 24 Mich. 447; *Ganson v. Baldwin*, 93 Mich. 217, 53 N. W. 171; *Smith v. Sackor*, 23 Minn. 454; *Johnson v. Hunt*, 79 Miss. 639, 31 South. 205; *Haselton v. Haselton*, 166 Mo. 182, 65 S. W. 1005; *Larson v. Butts*, 22 Neb. 370,

35 N. W. 190; *Violet v. Rose*, 39 Neb. 660. 58 N. W. 216; *Buettgenbach v. Gerbig* (Neb.), 90 N. W. 654; *Witkowsky v. Gidney*, 124 N. C. 437, 32 S. E. 731; *Kennedy v. Stacey*, 60 Tenn. (1 Baxt.) 220; *Collins v. Boyett*, 87 Tenn. 334, 10 S. W. 512; *Cox v. Keathley*, 99 Tenn. 522, 42 S. W. 437; *Bank of Cookville v. Brier* (Tenn.), 43 S. W. 140; *McBroom v. Whitefield*, 108 Tenn. 422, 67 S. W. 794; *Stallings v. Hullum*, 89 Tex. 431, 35 S. W. 2; *Gober v. Smith* (Tex. Civ. App.), 36 S. W. 910; *Virginia etc. Iron Co. v. McClelland*, 98 Va. 424, 36 S. E. 479; *In re Smith*, 2 Hughes, 307, Fed. Cas. No. 12,979 considering a Virginia statute. Nor can the husband, without the wife's consent, transfer title even conditionally: *Moore v. Reaves*, 15 Kan. 150. And the wife must join, even though a life estate in the homestead is reserved to her: *Gadsby v. Monroe*, 115 Mich. 282, 73 N. W. 367.

A wife cannot be forced to part with her right to the homestead. So where a purchaser of property received a deed from the husband alone, and filed a bill in chancery, praying for an assignment of the homestead in such premises, and the premises not being susceptible of division, the court decreed that the wife should convey to the purchaser her homestead right, upon his depositing in court one thousand dollars for her benefit, it was held that such decree was void, the court saying: "To permit this decree to stand, would allow the husband to do indirectly by the aid of the court that which he is prohibited by the statute from doing directly, which cannot be tolerated": *Brooks v. Hotchkiss*, 4 Ill. App. 175.

A sale of the homestead at auction is, of course, invalid if the wife does not join, and will not be specifically enforced: *Garlock v. Baker*, 46 Iowa, 334.

In all such cases there must be an actual, legal homestead. A wife acquires no separate rights in a homestead which the husband had purchased in his own name in fraud of creditors: *In re Boothroyd*, 15 N. B. R. 368, Fed. Cas. No. 1653.

**b. The Minority Rule.**—A few jurisdictions hold that a wife's consent is not necessary, and a conveyance from her husband alone passes title, he being the owner of the land embracing the homestead: *Wright v. Whittick*, 18 Colo. 54, 31 Pac. 490; *Whitesides v. Cushenberry*, 8 Ky. Law Rep. 590; *Pribble v. Hall*, 76 Ky. (13 Bush) 61, citing *Brame v. Craig*, 12 Bush, 404; *Gullett v. Arnett*, 19 Ky. Law Rep. 1892, 44 S. W. 957; *Gunnison v. Twitchel*, 38 N. H. 62; *Cook v. Higley*, 10 Utah, 228, 37 Pac. 336. In Arkansas, Nebraska, and Tennessee this view was at one time followed, but is so no longer: *Klenk v. Knoble*, 37 Ark. 298; *Schiels v. Horbach*, 49 Neb. 262, 68 N. W. 524; *Bilbrey v. Poston*, 63 Tenn. (4 Baxt.) 232; *Nichol v. Davidson County*, 76 Tenn. (8 Lea) 389.

**c. Compliance with Statutory Requirements.**—Where by statute certain requirements must be complied with before the homestead exemption attaches, the husband alone may convey until so done, as where it must be recorded or a claim filed: *Kennedy v. Broyles*, 55 Mo. App. 257; *Child v. Singleton*, 15 Nev. 461; *Commercial etc. Bank v. Corbett*, 5 Saw. 543, Fed. Cas. No. 3058.

**d. North Carolina Rule.**—In North Carolina, if the homestead is set apart and allotted, the husband alone cannot convey it, but where not allotted he preserves his *jus disponendi*: *Dixon v. Robbins*, 114 N. C. 102, 19 S. E. 239. To the same effect are *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922. The power of a husband thus to convey was restricted in *Cawfield v. Owens*, 130 N. C. 641, 41 S. E. 891, where the court held that though there had been no allotment of the homestead, if there was a judgment against the husband under which execution might issue, his wife's signature was necessary to the validity of a deed thereof.

Previous to the constitution of 1870, in Tennessee, the homestead was required to be laid off before there was any necessity for the wife's joining in its transfer: *Kincaid v. Burem*, 77 Tenn. (9 Lea) 553.

**e. Must not Trench upon the Homestead.**—The husband alone may convey, provided he does not trench upon the statutory amount of the homestead: *Nixon v. Hewes*, 80 Miss. 88, 31 South. 899; *Thorp v. Thorp*, 70 Vt. 46, 39 Atl. 245. So where he gave his sole deed to an undivided one hundred and ten acres out of a three hundred and ten acre tract, community property occupied as a homestead, it was held good: *Mass v. Bromberg* (Tex. Civ. App.), 66 S. W. 468. But where he conveys part of the homestead, and the value of the remaining portion is less than the statutory amount, the wife may recover a homestead in the tract conveyed, although the husband owns other lands in excess of that sum: *Cottrell v. Rogers*, 99 Tenn. 488, 42 S. W. 445.

**f. Former Alabama Rule.**—A peculiar construction of the homestead law existed formerly in Alabama, where the law exempted a homestead not exceeding a fixed amount, and, after being reduced to its lowest practical area, it still exceeded that sum, it was held not protected by the constitutional provision, and could be alienated by the husband alone: *Farley v. Whitehead*, 63 Ala. 295. This was altered by statute, providing that no title to the homestead interest in such a case should pass, but that the husband or wife might maintain a bill in equity to have the land sold and the homestead interest set apart: *Thompson v. Sheppard*, 85 Ala. 611, 5 South. 334.

It is well known that the homestead declaration or claim may include property of greater extent or value than the statute permits



the claimant to retain, in which event it would seem that the property was in part impressed with the homestead characteristic, and in part free from it, and that the free part should be subject to alienation or encumbrance to the same extent as if not included within the homestead claim. The question here suggested is one of very great importance, and it is surprising, and a matter for regret, that the decisions upon the subject do not yet permit of any confident answer to it. We have, however, already cited several cases which affirm that the excess is subject to conveyance by the husband without the consent of the wife. On the other hand, the California cases appear to proceed upon the assumption that whatever is included within the declaration of homestead is impressed with the homestead characteristic, and that there is no way of separating that which is impressed from that which is not, except under the provision of the code providing the procedure when a homestead has been subjected to levy under execution. Thus, it is said in *Quackerbush v. Reed*, 102 Cal. 500, 37 Pac. 755: "The homestead was the land or premises described, and any attempt to convey or mortgage it is unavailing."

Assuming, however, as is asserted in the majority of the cases, upon the subject, that the husband's conveyance may have some effect, when the premises conveyed are greater in value or extent than can be claimed as exempt from execution, what are the relative rights and remedies of the grantee under his deed, or of the homestead claimant and his family? Do they and such grantee hold the property as tenants in common, and has the grantee a right to enter into possession of the property, and enjoy it or any part of it, as against the wish of those entitled to the homestead? And has he or they any remedy by which the part to which each is entitled may be separated from the other? The only answer we can make to this is to say that in the case of the *State Nat. Bank of Louisiana v. Lyons*, 52 Miss. 181, it was held that the grantee might maintain a suit in equity for the purpose of having ascertained and set aside to him the part to be thereafter held free from the homestead claim.

## II. Mortgages and Deeds of Trust.

a. **Generally.**—Those courts holding void absolute conveyances by the husband alone also consider invalid mortgages and deeds of trust of the homestead: *Watts v. Gordon*, 65 Ala. 546; *Park v. Park* (Ark.), 72 S. W. 993; *Lies v. De Diablar*, 12 Cal. 327; *Best v. Allen*, 39 Ill. 30, 81 Am. Dec. 338; *Way v. Scott* (Iowa), 91 N. W. 1034; *Dollman v. Harris*, 5 Kan. 597; *Ayres v. Probasco*, 14 Kan. 175; *Hammond v. Rathbone*, 113 Mich. 499, 71 N. W. 858, 75 N. W. 928; *Wilder v. Haughey*, 21 Minn. 101; *Smith v. Lackor*, 23 Minn. 454; *Conway v. Elgin*, 38 Minn. 469, 38 N. W. 370; *Hab-*

bard v. Sage etc. Co. (Miss.), 33 South. 413; Watterson v. Bonner Co., 19 Mont. 554, 61 Am. St. Rep. 527, 48 Pac. 1108, citing American Sav. etc. Assn. v. Burghardt, 19 Mont. 323, 61 Am. St. Rep. 507, 48 Pac. 391; Swift v. Dewey, 20 Neb. 107, 29 N. W. 254; McCreery v. Schaffer, 26 Neb. 173, 41 N. W. 996; Whitlock v. Gosson, 35 Neb. 829, 53 N. W. 980; Downing v. Hartshorn (Neb.), 95 N. W. 801; Anderson v. Stadlmann, 17 Wash. 433, 49 Pac. 1070. While the Kentucky courts hold that a deed of the homestead by the husband alone is valid, they consider a mortgage executed without the wife's assent void: Tong v. Eifort, 80 Ky. 152; White v. Curd, 86 Ky. 19, 5 S. W. 553. As to the exemption of crops upon the homestead mortgaged by the husband alone, see Martin v. Davis, 104 Ga. 633, 30 S. E. 753.

In Missouri the husband alone may mortgage the homestead if no claim therefor has been filed by the wife: Tucker v. Wells, 111 Mo. 399, 20 S. W. 114; Greer v. Major, 114 Mo. 145, 21 S. W. 481, overruling Riecke v. Westenhoff, 85 Mo. 642, and Kaes v. Gross, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840.

Formerly in Vermont actual occupancy of the premises as a homestead was required in order to make a joinder of the wife necessary to the validity of a mortgage: Spaulding v. Crane, 46 Vt. 292.

**b. Effect of the Adoption of Constitutional Provisions.**—It was held in *Ex parte Jeter*, 64 S. C. 405, 42 S. E. 196, that the provisions of the constitution of 1895, relating to the alienation of homesteads, were not retroactive, and a mortgage thereof, assigned before the constitution, but executed after, did not require the signature of both husband and wife. But where executed after, in payment of a debt incurred before, the constitution went into effect, the wife must join in the mortgage: *Slaughter v. McBride*, 69 Ala. 510.

**c. Equitable Mortgage.**—Where a mortgagor executed to a mortgagee a promissory note, reciting that it should be covered by, or subject to, the mortgage, this was held to show an intent to make the mortgage a valid security for the debt, and to create an equitable mortgage on the premises for payment; but if the note was signed by the husband alone, the equitable lien thereof was held not to attach to the homestead included in the lands conveyed: *Butts v. Broughton*, 72 Ala. 294.

**d. Under Trust Agreement.**—Where a husband and wife convey in trust for the former land which afterward becomes homestead, with power in the trustee to convey without intervention or signature of the grantors, and such trustee conveys to a third person in trust for the husband, under an agreement that the latter trustee shall not convey or encumber it without the husband's consent, such trustee can, when requested by the husband, mortgage it without the wife's joining therein: *Des Moines Ins. Co. v. McIntire*, 99 Iowa, 50, 65 N. W. 565.

**e. Third Person may Take Advantage.**—The failure of the wife to join may be taken advantage of by a third person. So, where in answer to an action to foreclose a senior mortgage, executed by the husband alone, a junior mortgagee, holding a mortgage executed by both husband and wife, sets up that the property was homestead, and that the wife did not join therein, it is a good defense, even though the mortgagor does not defend: *Alley v. Bay*, 9 Iowa, 509.

**f. Validity as to the Excess.**—In *Moss v. Warner*, 10 Cal. 296, it was held that a mortgage on the homestead, executed by the husband alone, was of no validity as a lien upon the premises to the exemption of the statutory amount. Other cases go further and affirm that such mortgage is wholly void, irrespective of the value of the property: *Edwards v. Simms* (Ariz.), 71 Pac. 902, citing *Quackenbush v. Reed*, 102 Cal. 493, 37 Pac. 755.

### III. Charge or Renewal in Mortgage.

**a. Both Must Join Therein.**—Where a mortgage on the homestead has been executed by both husband and wife, it is valid, but the same strict rules apply to a change in the mortgage, or renewal thereof by the husband alone that apply to the original execution of the instrument. "The husband, without the consent of the wife, cannot mortgage the homestead, or enlarge or extend the terms of any such mortgage by his own agreement, or prolong the statute of limitations upon it, or renew it, or materially change it in any respect, or its legal effect, or revive it, after it is once paid or otherwise discharged": *Smyth on Homesteads*, sec. 271; *Barber v. Babel*, 36 Cal. 11; *Thompson v. Pickel*, 20 Iowa, 490; *Spencer v. Fredendall*, 15 Wis. 666; *Campbell v. Babcock*, 27 Wis. 512; *Dunn v. Buckley*, 56 Wis. 190, 14 N. W. 67. See, also, *Blake v. McCash*, 91 Iowa, 544, 60 N. W. 127.

The new mortgage may, however, be considered as the old one, only in a different form. In *Van Sandt v. Alvis*, 109 Cal. 165, 50 Am. St. Rep. 27, 41 Pac. 1014, a mortgagor, after having declared a homestead on the mortgaged premises, received an extension of time, and executed a new note and mortgage on the same property, his wife not joining therein; this the mortgagee recorded and then satisfied the old mortgage of record. The court held that though the latter mortgage was not effective as against the wife, equity would consider it simply as changing the form of the old mortgage, and enforceable upon the same terms as it would have been at the date of bringing suit. So, if the original note and mortgage are barred by the statute of limitations at the time of the foreclosure suit, a new mortgage by the husband alone is of no effect: *Barber v. Babel*, 36 Cal. 11. See, however, *Jenkins v. Simmons*, 37 Kan. 496, 15 Pac. 522, where the court refused to set aside a release of a mortgage, the new one not being joined in by the wife.

A relinquishment by the husband alone of the right to redeem from a mortgage does not bar the wife's right of homestead: *Haggerty v. Brower*, 105 Iowa, 395, 75 N. W. 321.

**b. Husband Alone Extending the Statute of Limitations.**

**1. Authorities Allowing It.**

**A. Depending on Nature of the Homestead Right.**—The question whether the husband alone may extend the time for payment of the mortgage depends upon what the court, in which the point arises, considers the nature of the wife's interest in the homestead. This is pointed out in *Smith v. Scherek*, 60 Miss. 491, in the following language: "In several of the states it is held, under statutes declaring mortgages of the homestead void unless the wife joins in them, that a renewal of the debt protected by mortgage will not prolong the security except by the renewed assent of the wife; but this conclusion is based upon the premise that the effect of such statutes is to give the wife a right of property, or at least a legal interest in the homestead, though the legal title is in the husband. From such a premise the conclusion is sound. If the wife is by the statute vested with any legal or equitable ownership in the homestead, it seems clear that in order to prevent the bar of the statute of limitations she must renew her mortgage in the mode pointed out by the statute for executing it, and such is the doctrine in several states: *Smyth on Homesteads*, sec. 271. But our doctrine is that our statute . . . . confers no right of property upon the wife, but a simple veto power upon the sale or encumbering of it: *Billingsley v. Niblett*, 56 Miss. 537. It remains, despite the statute, the exclusive property of the husband where the legal title resides in him, but with a limitation upon the *jus disponendi*, by which he is prevented from selling or encumbering it without the conjoint act of the wife. When, however, she has given her assent in the mode appointed by law, it is operative to its full effect, and can neither be recalled nor restricted by her. When, therefore, she joins in mortgage of it to secure a debt, the property, quoad the mortgage, ceases to be a homestead, and is bound as any other property of the husband would be; and as long, therefore, as the debt is kept alive by him who owes it, the mortgage remains in full force. Having consented that it might be bound for that debt, it must so continue until the debt be discharged by judgment, or by such lapse of time as constitutes a valid bar in behalf of the debtor. We speak only of a case where the debt is kept alive by renewals, and a new promise made and executed before any bar attached, and have no reference to a case where a debt fully barred is renewed by the husband." See, also, *Hambrick v. Jones*, 64 Miss. 240, 8 South. 176.



**B. Depending on Nature of the Statute of Limitations.**—The nature of the statute of limitations is also of importance in determining the effect of a renewal by the husband alone. In *Mahon v. Cooley*, 36 Iowa, 479, the court said: "Whatever may be the wife's interest in the homestead, she conveyed it by the mortgage to secure the debt, and it follows from the foregoing rules that the mortgage will bind her interest until the debt be discharged. But the operation of the statute of limitation is not to discharge the debt; it simply bars the remedy. . . . The remedy is cut off by the statute; it is restored by the admission. In neither case is the debt itself affected."

**2. Authorities Opposed Thereto.**—Other authorities, however, hold that the husband alone cannot extend the time for suing, and that such an agreement does not continue the life of the mortgage beyond the time when it would otherwise be barred: *Barber v. Babel*, 36 Cal. 11; *Hardman v. Portsmouth Sav. Bank*, 10 Kan. App. 327, 61 Pac. 984; affirmed, 61 Pac. 1131; *Dunn v. Buckley*, 56 Wis. 190, 14 N. W. 67. But a mere agreement to extend the time does not destroy the validity of the original mortgage: *Jenness v. Cutler*, 12 Kan. 500.

#### IV. Surrender and Assignment of Instrument Under Which the Homestead is Held.

**a. Certificates of School Lands.**—The wife must join in the assignment of a certificate of school lands, held as a homestead: *Hartman v. Munch*, 21 Minn. 107; *Law v. Butler*, 44 Minn. 482, 47 N. W. 53; and this is so although the husband had received no patent from the state, but had paid the purchase money: *McCabe v. Mazuchelli*, 13 Wis. 478.

**b. Lease or Contract.**—A husband cannot by his sole act assign or surrender a lease, under which a homestead is occupied: *Beranek v. Beranek*, 113 Wis. 272, 89 N. W. 146; although formerly held valid: *Platto v. Cady*, 12 Wis. 461, 78 Am. Dec. 752. Nor can he alone assign or surrender a contract under which he and his wife claim title: *Gardner v. Gardner*, 123 Mich. 673, 82 N. W. 522; *Rawles v. Reichenbach* (Neb.), 90 N. W. 943. See, also, *Lessell v. Goodman*, 97 Iowa, 681, 59 Am. St. Rep. 432, 66 N. W. 917, citing *Pelan v. De Bevard*, 13 Iowa, 53. And where the husband cancels such contract, his wife, in her own name, may have specific performance decreed: *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743. An assignment of such contract before the wife had any homestead right in the property, however, is valid by the husband alone: *Dahl v. Thompson*, 98 Iowa, 599, 67 N. W. 579.

As to the cancellation of a bond to reconvey the property to the owner and his wife by agreement of the husband alone not binding the wife, see *Shaffer v. Huff*, 49 Ga. 589.

**c. Assignment for Benefit of Creditors.**—A deed of assignment for the benefit of his creditors executed by the debtor alone does not divest him or his wife of their homestead exemption, that coming within the statute that “no mortgage, release or waiver of exemption shall be valid” unless subscribed by husband and wife: *Hemphill v. Haas*, 88 Ky. 492, 11 S. W. 510, 11 Ky. Law Rep. 62. As to the assignment of a mortgage prior to the homestead being held good as against it, see *Spalti v. Blumer*, 63 Minn. 269, 65 N. W. 454.

## V. For Public Purposes.

**a. Dedication.**—Under a statute providing against the conveyance or encumbrance of the homestead, unless by the joint act of the husband and wife, a husband alone cannot dedicate the homestead to a public use: *City and County of San Francisco v. Grote*, 120 Cal. 59, 52 Pac. 127.

**b. Eminent Domain.**—Where, however, the homestead is taken under the law of eminent domain, the husband may dispose of the money received therefor, and the wife's consent is not necessary: *Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385.

## VI. Title by Descent.

Voluntary alienation does not refer to title by descent: *Turner v. Bennett*, 70 Ill. 263. In that case the court said: “The term ‘alienation,’ used in the amendatory act, cannot, in any proper sense, apply to the case of the descent of lands to heirs under the law of descent. It must mean a transfer or conveyance, such an one as the signature and acknowledgment of a party are proper to effect, as the law requires those acts as conditions to the alienation of the homestead. If the homestead exemption applies to the case of the descent of property, then it may be released in the mode provided by the statute, as the act contemplates that it may be released. But it would be preposterous to suppose the legislature intended any such thing, as that the ‘signature and acknowledgment of the wife’ should apply to the case of the operation of the law of descent.”

## VII. To What Extent Invalid.

Where by law all conveyances and encumbrances of the homestead by one only of the spouses are declared to be invalid, this means that they are absolutely void, and may be taken advantage of by either the husband or wife, or a third person, as if no deed had been executed: *Goodwin v. Goodwin*, 113 Iowa, 319, 85 N. W. 31; *Morris v. Ward*, 5 Kan. 239; *Atkinson v. Gowdy*, 10 Ky. Law Rep. 173, 8 S. W. 698; *Sherrid v. Southwick*, 43 Mich. 515, 5 N. W. 1027; *Barton v. Drake*, 21 Minn. 299; *Abell v. Lothrop*, 47 Vt. 375; *Martin v. Harrington*, 73 Vt. 193, 87 Am. St. Rep. 704, 50 Atl. 1074. And

see *Stallings v. Hullum*, 89 Tex. 431, 35 S. W. 2. So where a mortgage of the homestead is void as to the wife on account of mental incapacity, it is also void as to the husband: *Ballinger v. Lester*, 23 Ky. Law Rep. 23-53, 67 S. W. 266.

### VIII. Validating Conveyance by Subsequent Act.

a. **By Miscellaneous Acts.**—The law is that such conveyances being void, they cannot be validated by any subsequent act: *Morris v. Ward*, 5 Kan. 239. So where the land subsequently loses its character as a homestead, title thereto will not pass by means of the former void deed: *Barton v. Drake*, 21 Minn. 29; *Law v. Butler*, 44 Minn. 482, 47 N. W. 53; *McKenzie v. Shows*, 70 Miss. 388, 35 Am. St. Rep. 654, 12 South. 336; *Herron v. Knapp etc. Co.*, 72 Wis. 553, 40 N. W. 149. Nor does the subsequent death of the wife without children make it a good conveyance: *Martin v. Harrington*, 73 Vt. 193, 87 Am. St. Rep. 704, 50 Atl. 1074; nor a subsequent divorce: *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830.

b. **By Abandonment.**—The subsequent abandonment of the homestead does not impart validity to a deed void by virtue of the fact that only one of the spouses signed it: *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433; *Belden v. Younger*, 76 Iowa, 567, 41 N. W. 317, citing *Lunt v. Neeley*, 67 Iowa, 367, 24 N. W. 739; *Stinson v. Richardson*, 44 Iowa, 373; *Bruner v. Bateman*, 66 Iowa, 488, 24 N. W. 9; *Cowgell v. Warrington*, 66 Iowa, 666, 24 N. W. 266; *Alexander v. Vennum*, 61 Iowa, 160, 16 N. W. 80; *Donner v. Redenbaugh*, 61 Iowa, 269, 16 N. W. 127; *Barnett v. Mendenhall*, 42 Iowa, 296; *Clark v. Evarts*, 46 Iowa, 250. See, however, the following, to the effect that abandonment and acquisition of a new homestead operate to pass title, though the deed not executed by the wife: *Anderson v. Carter* (Tex. Civ. App.), 69 S. W. 78, citing *Marler v. Handy*, 88 Tex. 429, 31 S. W. 636; *Stallings v. Hullum*, 89 Tex. 431, 35 S. W. 2; *Colonial etc. Mortgage Co. v. Thetford* (Tex. Civ. App.), 66 S. W. 103. As to the abandonment of the business homestead, see *Inge v. Cain*, 65 Tex. 75; *Dickson v. Allen* (Tex. Civ. App.), 24 S. W. 661. In *Jenkins v. Henry*, 52 Kan. 606, 35 Pac. 216, the wife had never made the premises her home and before the execution of the conveyance by the husband all the other members of his family had left it, he alone dwelling thereon at the time of making the conveyance. He subsequently abandoned it, and his deed was held valid.

A contract by one of the spouses alone may be consummated by abandonment, and will pass a good title. So where a woman furnished her mother's house and took possession thereof, and thereafter supported her mother and her mother's husband, with the understanding that the property, which had been the mother's home-

stead should become hers on the death of her mother, it was held that when the daughter took possession it became her homestead, the former owner and her husband abandoning it in consummation of the contract, and it was not necessary for both husband and wife to join in and sign the conveyance, performance by the daughter of her oral contract giving her the right and equity to the property: *Drake v. Painter*, 77 Iowa, 731, 42 N. W. 526.

Where, of course, the homestead has been abandoned, the husband acting alone, in good faith, can sell it: *Slavin v. Wheeler*, 61 Tex. 654.

### IX. Estoppel.

**a. Applicability of the Doctrine.**—Title is often attempted to be passed through a deed by the husband alone by means of the doctrine of estoppel, but it is generally held such conveyance is void and does not operate against him as an estoppel, though founded on a valuable consideration: *Halso v. Seawright*, 65 Ala. 431. So where one executed a mortgage of land, including his homestead, not then selected, as to which the instrument was void on account of the nonjoinder of the wife in the manner required by law, it was held not to estop him from selecting the portion so mortgaged as his homestead: *Marks v. Wilson*, 115 Ala. 561, 22 South. 134. The conduct of the husband cannot operate as an estoppel against the wife, she being a stranger to such conduct: *Gober v. Smith* (Tex. Civ. App.), 36 S. W. 910; and if the conveyance is to become valid by estoppel, such estoppel must operate as to both, as neither of them alone can give it validity: *Law v. Butler*, 44 Minn. 482, 47 N. W. 53.

The applicability of the doctrine is well expressed in *Cumps v. Kiyo*, 104 Wis. 656, 80 N. W. 937, in these words: "The policy of the statute indicated is not to give the wife a mere personal right for her personal benefit which she may waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it—a beneficent policy of the highest character, calling for a broad, liberal application of the statute, so as to carry it out, fully, in letter and spirit. If it should be held that the homestead right is a mere privilege which the wife may waive, or which may be lost under the rules of equitable estoppel, a very efficient way would be open to evade and nullify the statute. Such right is placed high above the reach of any such dangers by the absolute disability to alienate the homestead in any manner, except by a joint conveyance of some kind, signed by the husband and wife. The disability of the husband to otherwise convey the homestead is as complete as if it were not alienable at all, and of the wife to otherwise consent to such alienation, as if she were a minor. The doctrine of this case and of



those cited does not militate against the capacity of the wife to be affected by an equitable estoppel, as to whether specific property is or is not a homestead, or from denying that a paper signed by her, covering the homestead, was so intended: *Nelson v. McDonald*, 80 Wis. 650, 27 Am. St. Rep. 71, 50 N. W. 893. The limit of the doctrine declared and applied is that the law of estoppel cannot take the place of the statutory requisite to alienation": See, also, *Davis v. Thomas* (Neb.), 92 N. W. 187.

That a disclaimer by the husband at the time of conveying that such property was his homestead not validating a deed by him alone, see *Williams v. Swetland*, 10 Iowa, 51. As to married women being estopped by their deliberate conduct, see *Norton v. Nichols*, 35 Mich. 148.

A deed ineffectual because not joined in by the wife may become effectual after the death of the wife by being recognized and adopted by the husband, or he may be estopped by his own conduct from claiming that it does not pass title after its homestead character had ceased: *Adams v. Gilbert* (Kan.), 72 Pac. 769, citing *McAlpine v. Powell*, 44 Kan. 411, 24 Pac. 353; *Sellers v. Crossan*, 52 Kan. 570, 35 Pac. 205; *Sellers v. Gay*, 53 Kan. 354, 36 Pac. 744, to the effect that estoppel may be invoked to defeat the operation of the homestead law.

**b. Effect of Covenants in Conveyances.**—It is well settled that a covenant in a mortgage of the homestead executed by the husband alone cannot act as an estoppel against the mortgagor: *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830, the court saying: "To work an estoppel the mortgage itself must be a valid instrument. The covenants can have no greater validity than the deed itself. It would nullify the statute to hold that a deed which the law declares void should, by reason of the covenants of the grantor, operate effectually as a conveyance": *Bigelow on Estoppel*, 338-340; *Thompson on Homesteads and Exemptions*, see. 474; *Connor v. McMurray*, 2 Allen, 202; *Barton v. Drake*, 21 Minn. 299; *Conrad v. Lane*, 26 Minn. 389, 37 Am. Rep. 412, 4 N. W. 695. Nor can a covenant in a void deed be given life as an effectual conveyance by a decree of divorce: *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190, citing *Phillips v. Stauch*, 20 Mich. 369, 381; *Watertown Fire Ins. Co. v. Sewing Machine Co.*, 41 Mich. 131, 32 Am. St. Rep. 146, 1 N. W. 961; *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374. See, also, for further authorities, the cases cited under "Estoppel in Leases," XII, b, and "Estoppel in Acknowledgments," XIX, i, herein.

#### **X. Excess Above Homestead.**

. While void as to the homestead, the husband's individual deed is generally considered good as to other property conveyed thereby,

and the excess above the statutory amount passes: *McGuire v. Van Pelt*, 55 Ala. 344; *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Gray v. Schofield*, 175 Ill. 36, 51 N. E. 684; *Donahoe v. Chicago etc. Club*, 177 Ill. 351, 52 N. E. 351; *Pryne v. Pryne*, 116 Iowa, 82, 89 N. Y. 108; *State Nat. Bank v. Lyons*, 52 Miss. 181; *Howell v. Bush*, 54 Miss. 437; *Swift v. Dewey*, 20 Neb. 107, 29 N. W. 254. The reason for so holding is thus expressed in *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817: "A contract to convey a homestead, executed by the husband alone, is not illegal in the sense of being prohibited as an offense. The illegality is not that which exists where the contract is in violation of public policy or of sound morals, or founded on an illegal consideration, which would vitiate the whole instrument. The sole object of the statute was to prevent the alienation of the homestead without the wife's joining in the conveyance or contract. The policy of the law extends no further than merely to defeat what it does not permit. It merely withholds from the husband the power to alienate the homestead in that way—in other words, provides that the homestead is not grantable in that way; and it was never held that the whole grant would be void, merely because a part of the land was not grantable." In *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374, the fact that the value of the property exceeded the statutory limit was held not to render a contract to convey, executed by the husband alone, enforceable, the court following *Phillips v. Stauch*, 20 Mich. 369, where, in a similar case, specific performance as to the residue was refused, because it was not the contract the parties made and would require new arrangements not convenient for a court of equity to frame.

If the homestead is not capable of severance, a deed thereto by the husband alone is void as to the entire tract conveyed: *Sammon v. Wood*, 107 Mich. 506, 65 N. W. 529.

While a conveyance of the homestead and personalty by the husband alone is void as to the former, the latter passes: *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749.

## XI. Conveyance by One Spouse to the Other.

**a. Generally Held Good.**—The authorities are not entirely harmonious on the question as to whether in a deed of the homestead by one spouse to another, the consent and joinder of the grantee spouse is necessary. The general rule is that it is not; that the statutes refer only to alienations of the homestead to third persons; and that to require the wife to unite in a conveyance to herself would be to demand the performance of an absurd and idle ceremony: *Turner v. Bernheimer*, 95 Ala. 241, 36 Am. St. Rep. 207, 10 South. 750; *Luhrs v. Hancock* (Ariz.), 57 Pac. 605; *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441; *Beedy v. Finney* (Iowa), 91 N. W. 1069; *Lynch v. Doran*, 95 Mich. 395, 54 N. W. 882; *Furrow v. Athey*,

21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208; *Hall v. Powell*, 8 Okla. 276, 57 Pac. 168; *Riehl v. Bingenheimer*, 28 Wis. 84; *Wochoska v. Wochoska*, 45 Wis. 423; *Thompson v. McConnell*, 107 Fed. 33, 46 C. C. A. 124. The husband alone may convey the homestead to his wife, but it is still a homestead, and both must join in a conveyance in order to alienate it: *Spoon v. Van Fossen*, 53 Iowa, 494, 5 N. W. 624.

We think it unfortunate that the courts have not abided by the language of the different statutes which, in most of the states, declare, in general terms, that a conveyance or encumbrance in which both spouses do not join is void. It is said that what is meant is, that a conveyance or encumbrance by either to a third person is void. If so, such is not the language of the statute, and the courts, in our judgment, should not have made an interpolation therein not expressly sanctioned by the legislature, and in one state at least there has been no departure from the express language of the statute, and a conveyance from a husband to a wife has been held valid only as to that part of the property in excess of the amount which could be held as a homestead: *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129; *Stickel v. Crane*, 189 Ill. 211, 59 N. E. 595.

In California, it was at first held that a conveyance of a homestead by a husband to his wife was valid, though her assent thereto was not expressed otherwise than by her being named as grantee in, and by her acceptance of, the deed: *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. 715. This decision and that of *In re Lamb*, 95 Cal. 397, 30 Pac. 568, both assume that where the operation of the conveyance is to vest the legal title thereto in the wife as her separate property, it does not constitute an abandonment of the homestead. In the more recent case of *Freiermuth v. Steigelman*, 130 Cal. 392, 80 Am. St. Rep. 138, 62 Pac. 615, it appeared that a wife executed to her husband a mortgage on premises constituting part of the community property, and which had also been selected and dedicated as their homestead, and that he assigned the note and mortgage to the plaintiff in the action, who sought to foreclose it. The foreclosure was denied professedly because, when the community property was impressed with the character of a homestead, it could not be conveyed or encumbered, unless the instrument by which this was attempted to be done was executed, both by the husband and the wife, and that it could not be abandoned except by a declaration executed and acknowledged by both. The court said: "The law forbids the transfer of a homestead to any one—to the husband or any other person—except it be done as prescribed by statute. The purpose of the law is to place it beyond the power of either spouse acting alone to destroy the homestead character impressed upon the real estate, or encumber it in any

way. It cannot be said that the law was substantially complied with or that the husband was relieved from the necessity of signing the mortgage in the present case because he was the mortgagee, for that would still violate the express requirements of the statute. It simply results that the homestead declared on community property cannot be mortgaged by the wife to her husband; (1) because she cannot alone mortgage it to him or anyone else; and (2) because the husband cannot mortgage to himself, and therefore his signing the mortgage would not make it any the less illegal." This has been relied upon as overruling the other California decisions sustaining conveyances of homesteads made by husbands to their wives. It is, however, reasonably certain that no such result was intended, and that a conveyance of a homestead by a husband to his wife will, in this state, not be declared void, but will be conceded to have some effect. Precisely what that effect is cannot now be known. The case of *Pryal v. Pryal*, is still pending in that court. By the record it appears that after community property had become a homestead, the husband conveyed it to his wife. She, in turn, subsequently executed a conveyance purporting to convey the same property to her son. Afterward she died, and thereupon the husband commenced a suit against the son to determine their conflicting claims of title. The trial court declared in favor of the plaintiff, and the defendant appealed. At the first hearing in department 1 of that court, it, in its opinion pronounced March 5, 1903 (71 Pac. 802), declared that the rule announced in *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. 715, and *In re Lamb*, 95 Cal. 406, 30 Pac. 568, must be limited to homesteads declared upon the separate property of wives, and it was held, as in this case, that the homestead was upon the community property, and the conveyance thereof by the husband to his wife "did not in any way destroy the homestead, nor the right of the husband and wife, or either of them, thereto as a homestead, and that therefore, notwithstanding a conveyance, the title to the homestead vested in the plaintiff on the death of his wife." A rehearing was granted, and the court in bank, on November 30, 1903 (74 Pac. 000), concluded that "both upon principle and authority, the deed from the plaintiff *Pryal* to his wife operated as a conveyance of the legal title to the property in question, subject to the homestead, and that by her deed thereafter such title became vested in the defendant and appellant." Precisely what the rights of the husband would have been had this decision been permitted to stand, we cannot know, because the court contented itself merely with directing that the judgment of the trial court be reversed. At a later date a further rehearing was granted, and the case remains undetermined.



Where, after divorce, a husband executed to his former wife a deed of community property on which a homestead had been declared, it was held valid: *Grupe v. Byers*, 73 Cal. 271, 14 Pac. 863.

**b. Conveyance to Wife and Children.**—In *Sirr v. Miller*, 121 Mich. 598, 80 N. W. 580, a husband executed a deed of the homestead, in trust for his wife and children, providing for an ultimate division of the land and its proceeds among the survivors. This the court held void, saying that while a deed of the homestead by a husband to the wife with or without the intervention of a trustee, might be valid, it would not follow that a deed thereto in trust for the children would be, as that would be allowing the husband the right to cut off the homestead rights of the wife without her consent.

**c. Rule in Illinois—In Texas.**—The rule in Illinois arises out of a strict construction of the statute, and a conveyance of the homestead by one spouse alone to the other is void: *Kitterlin v. Milwaukee etc. Ins. Co.*, 134 Ill. 647, 25 N. E. 772, reversing, 24 Ill. App. 188; *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306; *Shields v. Bush*, 189 Ill. 534, 82 Am. St. Rep. 474, 59 N. E. 962. In such a case, however, the excess over the statutory amount passes: *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129; *Stickel v. Crane*, 189 Ill. 211, 59 N. E. 595.

In Texas the homestead cannot be mortgaged at all either by one spouse alone or by the joint action of both, and so a mortgage executed thereof to the wife is void: *Madden v. Madden*, 79 Tex. 595, 15 S. W. 480.

## XII. Leases.

**a. Prohibited Where Homestead Interfered With.**—The rule in regard to leases of the homestead is that it is void, when executed by one of the spouses only, when it interferes with the possession and enjoyment of the premises as a homestead: *Coughlin v. Coughlin*, 26 Kan. 116. So where the homestead was leased for a period of twenty-five years, with the privilege of prospecting for gas, coal, oil and other minerals, and to erect machinery and buildings, the assent of the wife was necessary: *Franklin etc. Co. v. Wea etc. Co.*, 43 Kan. 518, 23 Pac. 630. And the contract of the husband alone with a railway company, empowering it to use water from a spring on the homestead and to erect the necessary pumping-works is void: *Houston etc. Ry. Co. v. Cluck* (Tex. Civ. App.), 72 S. W. 83. Nor is a lease by the husband valid, where it conveys all rights to the timber on the homestead for turpentine purposes, and of all sawmill timber, for a period of ten years: *Pritchett v. Davis*, 101 Ga. 236, 65 Am. St. Rep. 298, 28 S. E. 666.

In *Southern Oil Co. v. Colquitt* (Tex. Civ. App.), 69 S. W. 169, a husband leased the homestead to the lessees, to extract oil and gas therefrom, and erect machinery and lay pipes, for a period of five

years, with a right of indefinite renewal. After holding that as a lease this contract was void, the court continued: "We are, however, of the opinion that the contract, although denominated an 'oil lease,' is in fact a conveyance of a portion of the homestead. It is held that oil in place under the soil is a mineral, and that minerals in place are land. . . . An oil lease investing the lessee with the right to remove all the oil in place, in consideration of his giving the lessor a certain per cent thereof, is, in legal effect, a sale of a portion of the land." Being such, the court decided it to be void as not complying with the statute requiring the signature of the wife to all conveyances of the homestead. See, also, *Palmer etc. Co. v. Parish*, 61 Kan. 311, 59 Pac. 640; *McKenzie v. Shows*, 70 Miss. 388, 35 Am. St. Rep. 654, 12 South. 336.

Where the homestead rights are not interfered with, a lease executed by the husband alone, is valid: *Dickey v. Waldo*, 97 Mich. 255, 56 N. W. 608. The wife need not join in a lease where the husband had not selected the homestead and still had three hundred acres contiguous to the family residence from which to select: *Wegner v. Lubenow* (N. Dak.), 95 N. W. 442. It is held in *Engelhardt v. Batla* (Tex. Civ. App.), 31 S. W. 324, that the husband alone may lease the homestead for a reasonable time; in that case it was one year.

**b. Estoppel in Leases.**—A tenant under a lease of a homestead executed by the husband alone is estopped during the existence of the term from asserting an adverse possession against either the husband or the wife: *Mauldin v. Cox*, 67 Cal. 387, 7 Pac. 804. But a lease by the husband of property claimed by the wife as her homestead does not estop her from denying the title of the lessor: *Morris v. Sargent*, 18 Iowa, 90. See *Harkness v. Burton*, 39 Iowa, 101, where the lessee's wife was held estopped where she had full knowledge of the work done and expense incurred, and was silent.

**c. Covenant in Lease.**—As has been already mentioned, a covenant in a conveyance is held to be of no effect where the instrument is void by reason of the fact that both spouses did not unite therein.

In *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749, however, a covenant for quiet enjoyment contained in a lease, invalid because executed by the husband alone, was held to give a cause of action for a breach thereof. The reason therefor is thus given: "The lease was executed in August, 1895, and the term was to commence February 1, 1896; and the covenant was that the plaintiff should quietly enjoy the premises for the term of one year. The covenant may have been entered into with the expectation that the wife would consent to the plaintiff's occupancy, or with the intention of acquiring another homestead before the time for the performance of the covenant arrived, or under a belief that he could lawfully lease the premises without his wife's consent. There is nothing in the record to show

that the defendant contemplated doing an unlawful act. The covenant was that the plaintiff should have the occupancy of the premises at a future day. This was not an illegal undertaking. He could covenant that the plaintiff should have quiet enjoyment of the premises at a future day; and if, when the time of performance arrived, he could not give lawful possession, or preferred not to do so, and did not, there is no good reason why he should not be liable in damages for the breach of his covenant"; citing *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76.

### XIII. Rights of Way.

a. **View Allowing Grants Thereof.**—As regards the power of the husband by his sole act to grant a right of way over the homestead, there are two views. One holds that he may do so, when such conveyance or grant will not defeat or interfere with the substantial enjoyment of the homestead as such: *Chicago etc. Ry. Co. v. Swinney*, 38 Iowa, 182; *Ottumwa etc. Ry. Co. v. McWilliams*, 71 Iowa, 164, 32 N. W. 315; *Randall v. Texas etc. Ry. Co.*, 63 Tex. 586; *Chicago etc. Ry. Co. v. Titterington*, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472.

b. **Criticism of the Rule.**—This rule is repudiated in *Pilcher v. Atchison etc. R. Co.*, 38 Kan. 516, 5 Am. St. Rep. 770, 16 Pac. 945, the court holding that the qualifying expression there used, "when it will not defeat the substantial enjoyment of the homestead as such," is too flexible, and its applicability too uncertain, and that the wife should be required to join in all such grants: See, also, *Cowan v. Southern Ry. Co.*, 118 Ala. 554, 23 South. 754; *McGhee v. Wilson*, 111 Ala. 615, 56 Am. St. Rep. 72, 20 South. 619; *Griffin v. Chattanooga etc. R. Co.*, 127 Ala. 570, 85 Am. St. Rep. 143, 30 South. 523; *Gulf etc. R. Co. v. Singleterry*, 78 Miss. 772, 29 South. 754.

In *Stokes v. Maxson*, 113 Iowa, 122, 84 N. W. 949, the right to use a doorway and stairs was held not to affect the substantial enjoyment of the homestead as such, and so the joint concurrence of husband and wife was unnecessary.

### XIV. Contracts to Convey.

a. **Same as Conveyances.**—A contract to convey stands upon the same plane as a conveyance itself, and is held to be within the inhibition of the statute providing against the alienation of the homestead by husband or wife alone. "A contract to convey, made by a husband alone, can have no better claim to validity than a conveyance. Aside from the rule in equity, by which such a contract is held to be equivalent to a conveyance of the equitable title, it seems clear that as a conveyance by the husband would be void, and would pass no title, the contract to make such void conveyance must be ineffectual to bind the land. It would be strange if a purchaser could take anything more, under a contract for a deed, than would

pass by the deed itself": See *Yost v. Devault*, 9 Iowa, 60; *Phillips v. Stauch*, 20 Mich. 369. See, in accord, *Anderson v. Culbert*, 55 Iowa, 233, 7 N. W. 508; *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431; *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817; *Larson v. Butts*, 22 Neb. 370, 35 N. W. 190; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216; and these authorities bear out the statement that neither specific performance will be decreed nor damages awarded. The assignment of a bond for a deed by the husband alone, on property claimed as a homestead, is unenforceable: *Stinson v. Richardson*, 41 Iowa, 373; as is also an option to the property: *Miller v. Gray* (Tex. Civ. App.), 68 S. W. 517.

A contract for a loan of money upon mortgage security will not defeat the wife's right of homestead upon her subsequent marriage to the mortgagor before the execution of the mortgage, under the Iowa statute. Specific performance will not be decreed, it merely being a case for damages: *Tolman v. Leathers*, 2 Fed. 653, 1 McCrary, 329.

**b. When Homestead Character Lost.**—While the property continues to be the homestead, a contract to convey it will not be enforced, husband and wife not joining therein: *Berlin v. Burns*, 17 Tex. 532. But it may be specifically enforced in Texas, when the property has lost its homestead character: *Goff v. Jones*, 70 Tex. 572, 8 Am. St. Rep. 619, 8 S. W. 525.

**c. Wife's Refusal to Join as a Defense.**—It is a valid defense to an action for specific performance of a contract to convey, that the property is homestead and that the wife refuses to join in the conveyance; and it is not necessary to prove her refusal to join on the hearing: *Yost v. Devault*, 9 Iowa, 60.

**d. Defective Conveyances as Contracts to Convey.**—A defective conveyance cannot be enforced as a contract to convey. This is well brought out in *Jenkins v. Harrison*, 66 Ala. 345, the court saying: "It is in this court a settled question, that a mortgage, or other alienation of the homestead of a husband, whatever may be its form, to which the voluntary assent of the wife is not manifested by her signature, in some mode appointed by law, is invalid for any purpose. It may operate upon other lands; but, as to the homestead, it is void—it is a nullity. The constitution refers to a mortgage, or to some other mode of alienation, by which the title is transferred; to legal conveyances, not to writings which import only a contract to convey, which are but the incipency of a complete alienation and transfer of title. It is not to such writings it is contemplated the wife shall yield her assent and give her signature, but to the act and instrument which operates to transfer the estate. The association of the words 'mortgage, or other alienation,' is a plain indication that the alienation, other than mortgage, which is contemplated, is an alienation of like kind with a mortgage; an alienation equally opera-



tive to pass the legal estate, not mere contracts to alienate. If to such instruments the wife should give her voluntary assent, and manifest it by her signature, there would remain to her the locus penitentie. When the contracts are to be performed, she could withhold her signature and assent, and the courts would be powerless to compel her to performance: *Waddell v. Weaver*, 42 Ala. 293; *McBryde v. Wilkinson*, 29 Ala. 662. The instrument to which the wife here gave her signature and assent, though in form an absolute conveyance, was not delivered in the life of the husband, and, for the want of delivery, remains only as an instrument of evidence of the contract, binding the husband to convey. It is, of consequence, not the instrument of alienation to which the constitution requires the voluntary assent and signature of the wife." To the same effect is *Henderson v. Kirkland*, 127 Ala. 185, 28 South. 674.

#### XV. Conveyance of the Reversion.

While the wife must join in a present conveyance of the homestead, it has been held that in a conveyance of the reversion such joinder is not necessary: *Jenkins v. Bobbitt*, 77 N. C. 385; *Joyner v. Sugg* (N. C.), 44 S. E. 122, and cases cited. And in *Mash v. Russell*, 69 Tenn. 543, it was held that a deed by husband and wife, of the homestead, but without a privy examination of the wife, as required by law, is operative to vest the grantee with the husband's interest in reversion, expectant on the termination of the homestead estate, citing *Moore v. Hervey*, 1 Tenn. Leg. Rep. 22.

As to whether the reversion will pass without reserving the homestead right there is some conflict. The court in *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420, after reciting the statute in force in that state, continued: "Substantially the same provision is contained in the statutes of California and in the constitution of Texas; yet the supreme court of each of those states has held that a conveyance of the homestead by the husband without the concurrence of his wife, although it contains no reservation of the homestead right, but is absolute in terms, is a good conveyance of the reversionary interest in the property after the homestead right ceases: *Gee v. Moore*, 14 Cal. 472; *Stewart v. Mackey*, 16 Tex. 56, 67 Am. Dec. 609. These decisions are rested on the ground that the entire object of the provision is to secure a homestead, and that it was not intended to infringe upon the husband's rights of property any further than was necessary to accomplish that object; or, in other words, the disability of the statute only goes to the extent essential to preserve the homestead. It is, however, the settled law of this state, repeatedly recognized and enforced by the judgments of this court, that a conveyance by a married man of his homestead, containing no reservation of the homestead right, is null and void unless signed by the wife": See, also, *Jerdee v. Furbush* (the principal case), 115

Wis. 277, 91 N. W. 661. Where the husband alone conveys, reserving to himself and his wife the use of the property for their lives, it is valid, passing the reversion; but where it is coupled with an agreement that the grantee shall have a home in the dwelling and use the land in connection with the husband, it is void as an encroachment on the wife's homestead: *Town v. Gensch* (Wis.), 76 N. W. 1096.

#### XVI. Exceptions to the Rule Requiring Joinder of Husband and Wife.

**a. For Purchase Money.**—One of the well-recognized exceptions to the rule that the husband and wife must both join in encumbrances upon the homestead is made in the case of the purchase money paid for the property so used: *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865; *Park v. Park* (Ark.), 72 S. W. 993; *Kimble v. Esworthy*, 6 Ill. App. 517; *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493; *Cole v. Gill*, 14 Iowa, 527; *Burnap v. Cook*, 16 Iowa, 149, 85 Am. Dec. 507; *Riley v. Filmore*, 4 Ky. Law Rep. 347; *Amphlett v. Hibbard*, 29 Mich. 298; *Fournier v. Chisholm*, 45 Mich. 417, 8 N. W. 100; *Girzi v. Carey*, 53 Mich. 447, 19 N. W. 139; *Wilder v. Haughey*, 21 Minn. 101; *Billingsley v. Niblett*, 56 Miss. 537; *Roby v. Bismarck Nat. Bank*, 4 N. Dak. 156, 50 Am. St. Rep. 633, 59 N. W. 719; *Clitus v. Sangford* (Tex. Civ. App.), 24 S. W. 325; *Davenport v. Hicks*, 54 Vt. 23; and the homestead being subservient to the purchase money, the husband alone may, in Texas, convey it in satisfaction thereof: *De Bruhl v. Maus*, 54 Tex. 464; *Arekenhold v. Evans Co.*, 11 Tex. Civ. App. 138, 32 S. W. 795. So the husband may surrender a mortgage for the purchase money and execute a new one, and it will be valid in so far as it covers such money: *Pratt v. Topeka Bank*, 12 Kan. 570. But the husband, without the assent of his wife, cannot charge the land by an agreement to pay interest in addition to the purchase money, any more than he can make an entirely new contract: *McHendry v. Reilly*, 13 Cal. 75.

But where the husband conveys the homestead for purchase money in fraud of the wife, it is invalid: *Sherring v. Augustus*, 11 Tex. Civ. App. 194, 32 S. W. 450; *Arnold v. Macdonald*, 22 Tex. Civ. App. 487, 55 S. W. 529. Where the vendor has waived his lien by taking personal security from the vendee for the purchase money, a mortgage executed upon the homestead by the husband alone is void: *Cannon v. Bonner*, 38 Tex. 487. An indebtedness for lumber, used in erecting a dwelling-house on the homestead, has been held to constitute no part of the purchase price thereof, and a mortgage by the husband alone, void: *Smith v. Lackor*, 23 Minn. 454, quoting *Cogel v. Mickow*, 11 Minn. 475.

**b. Prior Equities and Encumbrances.**—It is also recognized as the law that where property acquires the homestead character subse-

quently to the creation of a lien or encumbrance, such instruments are not effected thereby, nor is the property released from their operation: *Kurz v. Brusch*, 13 Iowa, 371, 81 Am. Dec. 435; *Peregoy v. Kottwitz*, 54 Tex. 497; *Reed v. Howard*, 71 Tex. 204, 9 S. W. 109.

So, where the homestead is charged with prior equities and encumbrances, the husband alone has, in Texas, a right to adjust them. "The right of a husband to make arrangements in relation to these encumbrances, or to renounce lands thus burthened or subject to conditions and contingencies, could not be questioned by the wife, in virtue of her remote right which might arise if the encumbrances or conditions were ever discharged or removed, unless in cases where the husband is squandering the property, with the fraudulent design of depriving his wife of a homestead": *White v. Shepperd*, 16 Tex. 163, in accord with which are *Clements v. Lacey*, 51 Tex. 150; *Wheatley v. Griffin*, 60 Tex. 209; *Investor's etc. Co. v. Loyd*, 11 Tex. Civ. App. 449, 33 S. W. 750. And he may substitute therefor new liens: *Gillum v. Collier*, 53 Tex. 592; *Baker v. Collins*, 4 Tex. Civ. App. 520, 23 S. W. 493.

As to the husband acting in bad faith, no necessity for the sale of the homestead existing, see *Morris v. Geisecke*, 60 Tex. 633.

## **XVII. Voluntary Consent of the Wife.**

**a. Compliance with the Statutory Requirements.**—The voluntary assent of the wife being necessary, in most cases, to the validity of a conveyance or encumbrance of the homestead, it becomes of the highest importance to determine what such assent is and how it should be manifested.

Where the statute requires that certain acts be done by the wife, however willing she may be that title to the homestead should pass, those acts must be strictly carried out. So, where a husband and wife deeded an undivided one-half of their homestead to their son, and executed a contract in which they agreed to convey the other half at their death, in consideration of his supporting them, but the wife did not sign the contract, her execution of the deed was held not sufficient to pass the other half: *Webster v. Warner*, 119 Mich. 461, 78 N. W. 552.

**b. In Writing.**—As a general rule, assent not in writing is of no effect: *Donner v. Redenbaugh*, 61 Iowa, 269, 16 N. W. 127; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200. This, however, is not required in Kansas, and there the consent may be oral and evidenced by acts in pais: *Dudley v. Shaw*, 44 Kan. 683, 24 Pac. 1114; *Sullivan v. Wichita*, 64 Kan. 539, 68 Pac. 55, citing *Perrine v. Mayberry*, 37 Kan. 258, 15 Pac. 172; and may be proved in the same manner as any other material fact: *Pilcher v. Atchison etc. R. Co.*, 38 Kan. 516, 5 Am. St. Rep. 770, 16 Pac. 945.

### c. How Manifested.

1. **Signature Alone Sufficient.**—While the statutes of practically all the states require the wife's assent in writing, they are not harmonious as to what is a sufficient fulfillment thereof.

One line of cases holds that the signature of the wife is sufficient, and does not require that she be mentioned in the body of the instrument at all: *Dooley v. Villalonga*, 61 Ala. 129; *Hood v. Powell*, 73 Ala. 171; *Shelton v. Aultman etc. Co.*, 82 Ala. 315, 8 South. 232; *Wynn v. Ficklen*, 54 Ga. 529; *Christopher v. Williams*, 59 Ga. 779; *Yocum v. Lovell*, 111 Ill. 212; *Barrett v. Cox*, 112 Mich. 220, 70 N. W. 446.

2. **Must be in Body of Deed.**—The other and the stricter view requires the wife's name in the body of the deed, as releasing her homestead right: *Masillon etc. Co. v. Carr*, 24 Ky. Law Rep. 1534, 71 S. W. 859; *Greenough v. Turner*, 77 Mass. (11 Gray) 332. Where the wife is mentioned as party of the first part in a mortgage of the homestead, but does not join in the grant, nor express her intention of relinquishing dower or of waiving her homestead right, it is of no effect: *McGrath v. Berry*, 76 Ky. (13 Bush) 391; but, although she must relinquish the homestead in the body of the deed, her name need not be specifically mentioned, and it is sufficient if she is described therein as one of the undersigned mortgagors: *Withers v. Pugh*, 91 Ky. 522, 16 S. W. 277.

Where a statute requires the wife to join in the granting clause of the mortgage, a failure to do so makes it void: *Bluff City etc. Co. v. Bloom*, 64 Ark. 492, 43 S. W. 503. But in the absence of such statute, where the instrument, signed and acknowledged by the wife, contains apt words waiving her rights of homestead and dower, it is not material that her name does not appear in the granting clause: *Davis v. Jenkins*, 93 Ky. 353, 40 Am. St. Rep. 197, 20 S. W. 283.

The latter rule, requiring the wife's name in the body of the deed or mortgage, was formerly followed in Illinois: *Ayers v. Hawks*, 1 Ill. App. 600; *Panton v. Manley*, 4 Ill. App. 210.

### d. Fraud and Misrepresentation.

1. **By Third Person.**—While fraud may negative the idea of voluntary consent, it is not every fraud or misrepresentation which will have the effect of avoiding a conveyance of the homestead. Where the grantee is not a party to the deception, he is held to acquire a good title to the property; and the fraud of the husband does not prejudice such grants: *Webb v. Burney*, 70 Tex. 322, 7 S. W. 841; *German Bank v. Muth*, 96 Wis. 342, 71 N. W. 361. And in the absence of fraud on his part, or mutual mistake, the want of concurrence necessary to invalidate the instrument must be apparent on its face; and it cannot be contradicted by parol testimony: *Aetna Life Ins. Co. v. Franks*, 53 Iowa, 618, 6 N. W. 9. If there is no



proof of fraud or connivance, the wife's act in signing a mortgage to the homestead, although reluctant, is deemed voluntary in law: *Coleman v. Smith*, 55 Ala. 368.

**2. By Grantee or Mortgagee.**—Fraud on the part of the grantee or mortgagee is fatal to the validity of the instrument. So, where a wife signed a mortgage solely on account of the misrepresentations of the person for whose benefit it was executed, although she did not attempt to read it or have anyone else do so, it was held void: *Warden v. Reser*, 38 Kan. 86, 16 Pac. 60.

This same rule applies where the misrepresentations are made, not directly by the grantee, but by persons employed by him to procure the deed, and he is bound by them: *Barker v. Barker*, 27 Neb. 135, 42 N. W. 889.

Where the grantee has notice that fraud was used in obtaining the wife's signature, the deed does not pass title: *Ragland v. Wisrock*, 61 Tex. 391.

**e. Mistake or Ignorance.**—A mistake by, or ignorance on the part of, the wife, made in signing a conveyance or mortgage of the homestead, will not avoid such instrument. So where, through ignorance, part of the homestead is included, it will pass, the wife's assent given through mistake not being involuntary in the sense that it will invalidate the deed: *Edgell v. Hagens*, 53 Iowa, 223, 5 N. W. 136; *Van Sickles v. Town*, 53 Iowa, 259, 5 N. W. 148; *Quinn v. Brown*, 71 Iowa, 376, 34 N. W. 13.

In *Stewart v. Whitlock*, 58 Cal. 2, the wife, in executing a mortgage, was made acquainted with the literal contents thereof, but did not intend to include a certain portion of the homestead, and did not know that it was included, the mistake being caused by her husband's misrepresentation. It was held that such mistake could not avail her, as her mere intention, not communicated to the mortgagee, could not control the plain letter of her contract.

**f. Mere Relinquishment of Dower.**—It is now well settled that a mere relinquishment of dower by the wife is ineffectual to pass the homestead, and that sole purpose being expressed, it excludes all others: *Long v. Mostyn*, 65 Ala. 543; *Burrows v. Pickenz*, 129 Ala. 648, 29 South. 694; *Shattuck v. Byford*, 62 Ark. 431, 35 S. W. 1107; *Thornton v. Boyden*, 31 Ill. 200; *Sharp v. Bailey*, 14 Iowa, 387, 81 Am. Dec. 489; *Wilson v. Christopherson*, 53 Iowa, 481, 5 N. W. 687; *Wing v. Hayden*, 73 Ky. (10 Bush) 276; *Herbert v. Kenton Bldg. etc. Assn.*, 74 Ky. (11 Bush) 296; *Hayden v. Robinson*, 83 Ky. 615; *Moss v. Hall*, 1 Ky. Law Rep. 314, 3 Ky. Law Rep. 89; *Kiesewetter v. Kress*, 24 Ky. Law Rep. 1239, 70 S. W. 1065; *Connor v. McMurray*, 84 Mass. (2 Allen) 202. See, also, *Eisenstadt v. Cramer*, 55 Iowa, 753, 8 N. W. 427.

**g. Necessity for Joint Assent.**

**1. Must Exist.**—Not only must both husband and wife voluntarily execute any instrument affecting the homestead, but such execution must be joint: *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668. So where a wife, prior to the execution of a deed of the homestead, expressed herself as willing to join in it, but did not because her husband said it was not necessary, and after its delivery she said she was satisfied with it, the joint consent of the husband and wife was held not to be shown: *Durand v. Higgins* (Kan.), 72 Pac. 567. See, also, *Wea etc. Co. v. Franklin etc. Co.*, 54 Kan. 533, 45 Am. St. Rep. 297, 38 Pac. 790. And where a mortgage was executed by the husband, and the wife's name was written in, but not by her, and certified as acknowledged by a notary, six weeks after which the wife executed an instrument attempting to ratify it, joint consent was held wanting: *Howell v. McCrie*, 36 Kan. 636, 59 Am. St. Rep. 584, 14 Pac. 257. And see *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910.

In order to constitute joint consent, it need not necessarily be given in the same place, at the same time, or in the same way: *Bell v. Slasor*, 8 Kan. 669, 57 Pac. 139; *Couch v. Capitol etc. Assn.* (Tenn. Ch. App.), 64 S. W. 340. So where a husband makes a deed to his homestead, and the wife does not join in it until five years after, it was held that if the wife's signing was part of the original transaction, it was good: *Howes v. Burt*, 130 Mass. 368.

**2. Separate Instruments.**—Where by statute a husband and wife are required to sign the same joint instrument, no difficulty arises as to the effect of separate conveyances: *Goodrich v. Brown* (Iowa), 13 N. W. 309. Even where the statute is not so explicit, separate deeds by husband and wife are generally held invalid: *Poole v. Gerard*, 6 Cal. 71, 65 Am. Dec. 481; *Duncan v. Moore*, 67 Miss. 136, 7 South. 221; *Dickinson v. McLane*, 57 N. H. 31.

In *Ott v. Sprague*, 27 Kan. 620, it is announced that two separate instruments may be effective, the court saying: "It might be that a husband and wife, by two separate instruments, could alienate the homestead, when it was intended by both that such instruments should operate together as a single instrument; for in such a case it might perhaps be said that the separate consent of each had such a connection with each other that they might together be considered as the joint consent of both. But where two separate instruments are executed at two separate and distinct times, as in this case; where a long interval elapses after one is executed before the other is executed, as in this case—the interval in this case being over eight years; and where the two instruments are executed without any reference to each other, or without any intention that the two together may be considered as one single and united instrument, we think that one cannot make the other valid."

In *Couch v. Capitol Bldg. etc. Assn.* (Tenn. Ch. App.), 64 S. W. 340, a husband, unknown to his wife, procured another woman to join with him in a deed of the homestead. Subsequently the wife executed another deed thereto to the same grantee, but the husband was ignorant of this. Joint consent was held wanting, in the following words: "The joint consent exacted by the constitution and statute means a concurrence and agreement of the husband and wife to sell or transfer their homestead, which to be effective, must be evidenced by a deed or instrument of writing, signed, executed and delivered as required by law. To hold that one spouse can execute a deed conveying the homestead without consulting and having the joinder of the other in it, and that thereafter the other can sell it without consulting and having the former join in it, it seems to us, opens the door for the evasion of the plain mandate of the constitution regulating the mode of the transfer of this important property right."

#### **h. Effect of Separation of Husband and Wife.**

**1. Consent Still Necessary.**—The fact that husband and wife are living separate and apart, that he has abandoned her, or driven her from him, does not deprive her of her homestead rights, or dispense with the necessity of her consent and joinder in any alienation of the homestead: *Chambers v. Cox*, 23 Kan. 393; *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190; *Gardner v. Gardner*, 123 Mich. 673, 82 N. W. 522; *France v. Bell*, 52 Neb. 57, 71 N. W. 984; *Herron v. Knapp etc. Co.*, 72 Wis. 533, 40 N. W. 149.

The reason therefor is thus expressed by Judge Cooley in *Sherrid v. Southwick*, 43 Mich. 515, 5 N. W. 1027: "The finding shows that she was driven from her home by misconduct on the part of her husband of a nature so grievous that she might have claimed a divorce under the statute. When a wife is thus driven off, she carries with her all her marital rights—the right to support, to dower, to control the disposition of the homestead: *Barker v. Dayton*, 28 Wis. 367, 383. This power of control is conferred upon her as a means of conservation and protection; but if the husband could acquire independent authority to dispose of the homestead without the wife's consent, by driving her with blows from his house, or by such other conduct toward her as should altogether destroy the comfort of home, her constitutional right to withhold her consent from a sale or mortgage would be of no value whatever. Indeed, as a means of restraint upon a vicious and unprincipled man, it might be worse than useless, for it would benefit him, if he desired to sell or encumber his homestead, to first break up his home: *Vanzant v. Vanzant*, 23 Ill. 536."

**2. Where Joinder Required Only if Living Together.**—In some states the statute provides that all conveyances of the homestead

shall be invalid, unless signed by the wife, if the husband be married and living with his wife. He cannot, in such case, drive her from home, and then convey, as that would practically repeal the act: *Scott v. Scott*, 73 Miss. 575, 19 South. 589. Where the husband is compelled to leave his family residing on the homestead, and go to another state in search of work, intending to return and take them with him if successful, there is no evidence of intent to abandon the family so as to validate a conveyance of the homestead by the wife alone, under the statute requiring both to sign if the husband be living with his wife: *Walton v. Walton*, 76 Miss. 662, 71 Am. St. Rep. 540, 25 South. 166; nor is a wife's temporary absence for the purpose of educating her children sufficient to empower the husband alone to convey: *Gibbons v. Hall* (Tex. Civ. App.), 59 S. W. 814. For a case in which the abandonment of the wife was held such as to validate a conveyance by her alone, see *Hector v. Knox*, 63 Tex. 613.

Where the constitution provides that where the marriage relation exists, a homestead can be alienated only by joint act of husband and wife, it is not competent for the legislature to enact a law allowing the wife, by her sole deed, to convey the homestead when abandoned by her husband, such desertion not dissolving the relation of husband and wife: *Couch v. Capitol etc. Assn.* (Tenn. Ch. App.), 64 S. W. 340.

i. **Effect of Insanity of One of the Spouses.**—It is, in the absence of statute, generally held that the insanity of one of the spouses does not dispense with the necessity of joinder of both husband and wife: *Thompson v. New England etc. Co.*, 110 Ala. 400, 55 Am. St. Rep. 29, 18 South. 315; *Whitlock v. Gasson*, 35 Neb. 829, 53 N. W. 980. It gives the husband no greater interest in the estate, and does not allow him to encumber it, except as provided by statute: *Security etc. Co. v. Kauffman*, 108 Cal. 214, 41 Pac. 467. So where by statute the sane spouse may apply to the court to enable him to alienate or encumber the homestead, the terms of the statute must be complied with in order to give the court jurisdiction, or the sale will be void; and a statute permitting such application and sale is not unconstitutional as interfering with a vested right of the insane spouse, or taking property without due process of law: *Jones v. Falvella*, 126 Cal. 24, 58 Pac. 311.

In *Soeker v. Redmond*, 59 Kan. 773, 52 Pac. 97, the joining of the guardian of an insane spouse, under an order of the probate court, in a mortgage of the homestead was held not such a joint consent as contemplated by the constitutional provision. But see *New England etc. Co. v. Spitler*, 54 Kan. 560, 38 Pac. 799.

Where a wife is insane, it is held in *Shields v. Aultman*, 20 Tex. Civ. App. 345, 50 S. W. 219, that the husband alone may convey the community property occupied as a homestead, as to hold otherwise



would hopelessly tie up the property in his hands. For a case in which the husband being insane, the wife was not allowed to dispose of the homestead, see *Heidenheimer v. Thomas*, 63 Tex. 287.

#### j. Power of Attorney.

1. **By One Spouse to the Other.**—The question has arisen whether one spouse can give to the other a power of attorney to convey or encumber the homestead, so as to pass title thereto. It has generally been answered in the negative, as it is held a personal privilege which cannot be delegated by one to the other: *Locke v. Redmond*, 6 Kan. App. 76, 49 Pac. 670. See, also, *Gagliardo v. Dumont*, 54 Cal. 496; *Wallace v. Travelers' Ins. Co.*, 54 Kan. 442, 45 Am. St. Rep. 288, 38 Pac. 489. In *Minnesota etc. Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019, a wife gave her husband a power of attorney to sell any lands in which she might have an interest. He mortgaged the homestead, and it was held that she was not estopped to deny the validity of the mortgage, he having exceeded the power of attorney, although she orally consented thereto and used the money.

In Washington, by a broad statute, a husband having a general power of attorney from his wife, authorizing him to mortgage all their real estate, can mortgage the homestead, which is community property, without her joining therein: *Oregon Mtg. Co. v. Hersner*, 14 Wash. 515, 45 Pac. 40.

2. **To a Third Party.**—It has been held that husband and wife can convey their homestead acting through an attorney in fact, where they both properly execute and acknowledge it: *Warren v. Jones*, 69 Tex. 462, 6 S. W. 775; *Jones v. Robbins*, 74 Tex. 615, 12 S. W. 824, in the former of which cases, it is said: "This court has said that the requirement that a husband and wife shall sign a deed of conveyance, and that the wife shall appear and acknowledge it, is fulfilled by their signing and her acknowledging a power of attorney to make the conveyance; and we cannot say that a requirement that they shall join in such conveyance, and that she shall sign and acknowledge it, is not fulfilled in the same way."

k. **Ratification.**—A wife may ratify the acts of her husband; so where the husband alone conveyed an undivided one hundred and ten acres out of a larger tract, which was community property, and occupied as a homestead, it was held that she might ratify it subsequently to the husband's death, and accept her homestead out of the remaining land: *Mass v. Bromberg* (Tex. Civ. App.), 66 S. W. 468. And where a contract to convey was not signed by the wife at the same time as the husband, but she afterward signed it and united with her husband in the deed, it was held a ratification by her, although her name did not appear in the body of the contract: *Epperly v. Ferguson* (Iowa), 91 N. W. 816.

A void instrument cannot be validated by any subsequent act, however. So where a mortgage was void by reason of the wife's not signing it; and a second mortgage was duly executed, reciting that it was subject to said void mortgage, there was no ratification: *Seifert etc. Co. v. Hartwell*, 94 Iowa, 576, 58 Am. St. Rep. 413, 63 N. W. 333.

1. **Necessity for Consideration.**—In the absence of statute, the question of consideration makes no difference, and it is no defense, where a wife executed a mortgage, that her husband received all the consideration: *Jamison v. Bancroft*, 20 Kan. 169. Under the California law, however, a wife has an interest in the homestead requiring a consideration for an agreement to convey or encumber it, and therefore her mortgage to secure an antecedent debt of her husband is not binding on her: *California etc. Co. v. Anderson*, 79 Fed. 404, citing *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028.

#### **XVIII. Constitutionality of Statutes Restricting Alienation of Homesteads.**

While the *jus disponendi* is a vested right, it may be restricted by provisions for dower and homestead: *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Joyner v. Sugg* (N. C.), 44 S. E. 122; and a restriction that the homestead can be alienated only by the joint deed of husband and wife is not unreasonable: *Virginia etc. Iron Co. v. McClelland* (Va.), 36 S. E. 479.

Curative acts are sometimes passed, validating all conveyances of homesteads, defective by reason of noncompliance with the statute regulating the same: *Alkire Grocery Co. v. Jackson*, 66 Ark. 455, 51 S. W. 459. See, also, *Seawel v. Dirst*, 70 Ark. 166, 66 S. W. 1058, relating to defective acknowledgments. A statute repealing such curative act, however, does not divest rights vested under such curative statute: *Beavers v. Myar*, 68 Ark. 333, 58 S. W. 40.

#### **XIX. Acknowledgment.**

a. **Importance of Statutory Requirements.**—Equally important with the signing of the mortgage or deed is the acknowledgment thereof; and where the statute requires that the husband and wife, or the wife alone, acknowledge it, failure to comply with it renders it a nullity: *Patterson v. Kreig*, 29 Ill. 514; *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Gage v. Wheeler*, 129 Ill. 197, 21 N. E. 1075, affirming 28 Ill. App. 427; *American Sav. etc. Assn. v. Burghardt*, 19 Mont. 323, 61 Am. St. Rep. 507, 48 Pac. 391; citing *Montana Nat. Bank v. Schmidt*, 6 Mont. 610, 13 Pac. 382; *McLeran v. Benton*, 43 Cal. 467; *Leonis v. Lazzarovich*, 55 Cal. 55; *Aultmann etc. Co. v. Jenkins*, 19 Neb. 209, 27 N. W. 117; *Betts v. Sims*, 25 Neb. 166, 41 N. W. 117; *Philips v. Bishop*, 31 Neb. 853, 48 N. W. 1106; *Horbaeh v. Tyrrell*, 48 Neb. 514, 67 N. W. 485, 489; *Wilson v. Mills*, 66 N. H.

315, 22 Atl. 455; *Huss v. Wells*, 17 Tex. Civ. App. 195, 44 S. W. 33; *First Nat. Bank v. Citizens' Bank* (Wyo.), 70 Pac. 726. The statute is of controlling effect, and where it provides that no alienation of the homestead shall be valid without the signature of the wife to the same, it does not require an acknowledgment by her: *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362, overruling *Hait v. Houle*, 19 Wis. 472. See, also, *Lawyer v. Slingerland*, 11 Minn. 447.

In the absence of a statute, it has been held that an acknowledgment as required for an ordinary conveyance is sufficient to satisfy the constitution: *Forsyth v. Preer*, 62 Ala. 443; *Butts v. Broughton*, 72 Ala. 294; *Jones v. Roper*, 86 Ala. 210, 5 South. 459.

**b. Strict Compliance Necessary.**—Where a method of examination is prescribed by statute, it is exclusive of all other modes, and, while literal compliance may not be necessary, must be strictly pursued: *Cahill v. Citizens' etc. Assn.*, 61 Ala. 232; *Scott v. Simons*, 70 Ala. 352; *Best v. Gholson*, 89 Ill. 465; *Tabler v. Sullivan*, 97 Ky. 79, 29 S. W. 972, 16 Ky. Law Rep. 817. So the word "voluntarily," when used alone in a certificate of acknowledgment, is not the equivalent of "her own free will and accord, and without fear, constraint, or persuasion of her husband," and its use is not a substantial compliance with the statute: *Scott v. Simons*, 70 Ala. 352. So where the words "or threats" of her husband are omitted it is defective: *Motes v. Carter*, 73 Ala. 553; as is also the use of the word "persuasion" in place of "threats": *Marx v. Threet*, 131 Ala. 340, 30 South. 831. See, also, *Reynolds v. Kingsbury*, 15 Iowa, 238.

It must appear from the acknowledgment that the husband and wife acknowledged to the officer taking the same that they waive and relinquish their homestead rights in the premises in Illinois: *Trustees v. Hovey*, 94 Ill. 394; *Ogden etc. Assn. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; affirming 99 Ill. App. 67. As to the acknowledgment formerly required of the wife, see *Vanzant v. Vanzant*, 23 Ill. 536; *Smith v. Miller*, 31 Ill. 157.

An acknowledgment made to a mortgage by a husband and wife, stating that the same was their act and deed, for the purpose therein mentioned, and that the wife relinquished all rights to dower and homestead, was held sufficient: *Kimmell v. Caruthers* (Ky.), 1 S. W. 2.

Where the certificate of acknowledgment fails to state that the wife was known or made known to the officer to be the wife of the grantor, as required by statute, there being nothing in the certificate to show that she was the wife or known to the officer to be the wife, or even that she was known to be the person executing the conveyance, it is fatally defective: *Penny v. British etc. Co.*, 132 Ala. 357, 31 South. 96. And where the officer is required to explain the instrument fully to the wife, a statement in the certificate that

she fully understood the contents of the deed, is not sufficient: *Langton v. Marshall*, 59 Tex. 296.

If the wife does not understand English, and the officer asks her the formal questions in that language, it is invalid: *Fisher v. Meister*, 24 Mich. 447. But where she does understand it, there is no necessity of an interpreter to explain its contents: *Pfeiffer v. Riehn*, 13 Cal. 643.

The wife must acknowledge that she releases her homestead right freely, voluntarily and without compulsion: *Boyd v. Cudderback*, 31 Ill. 113; and force or duress in obtaining it will avoid it: *Blumer v. Allbright* (Neb.), 89 N. W. 809.

**c. Relinquishment of Dower Therein.**—As in the execution of the instrument itself, a mere relinquishment of dower in the acknowledgment is not sufficient to bar the homestead right: *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S. W. 39; *Thornton v. Boyden*, 31 Ill. 200. In *Clubb v. Wise*, 64 Ill. 157, the wife released her homestead right in the body of the instrument, but in the acknowledgment relinquished only her dower, and it was held invalid as against the homestead. But see *Razar v. Donan*, 12 Ky. Law Rep. 114, 13 S. W. 914.

#### **d. Privy Examination.**

**1. In General.**—In some jurisdictions, the consent of the wife must be evidenced by privy examination, separate and apart from the husband, and where that is not observed, the conveyance will be held invalid: *Lambert v. Kinnery*, 74 N. C. 348; *Mash v. Russell*, 69 Tenn. (1 Lea) 543; *Christian v. Clark*, 78 Tenn. (10 Lea) 630. In *Garner v. Black*, 95 Tex. 125, 65 S. W. 876, it is held that a failure to examine the wife in private, rendered the instrument void, and not even color of title was conferred on the grantee, so as to support a plea of adverse possession. In *Fisher v. Meister*, 24 Mich. 447, the court held the presence of the husband during the examination unlawful. But in another case in the same court it was held that merely because the husband was present during the taking of the acknowledgment, a mortgage on the homestead would not be set aside, in the absence of an averment or showing that it was executed unwillingly, or under his compulsion or influence: *Norton v. Nichols*, 35 Mich. 148.

The privy examination, acknowledgment, and declaration before the officer must be averred, as they cannot be supplied by presumption or inference: *Cross v. Everts*, 28 Tex. 523. But the failure of the certificate of acknowledgment to state that the wife was examined separate and apart is not fatal, the statute not prescribing what shall be set forth. In such case it is open to the parties to show that she was not so examined: *Adams v. Smith* (Wyo.), 70 Pac. 1043.



2. **The Alabama Rule.**—In Alabama, no separate examination is required where the homestead is the separate property of the wife: *Weiner v. Sterling*, 61 Ala. 98; *Dawson v. Burus*, 73 Ala. 11.

#### e. Disqualification of Officer.

1. **Where Pecuniarily Interested.**—If the officer taking the acknowledgment is for any reason incompetent, the instrument is void: *Hayes v. Southern etc. Assn.*, 124 Ala. 663, 82 Am. St. Rep. 216, 26 South. 527, where the court, after stating that public policy forbids the taking and certifying of an acknowledgment by an officer financially interested in the instrument, continues: "Such is the doctrine in respect of ordinary conveyances, and the reason is more cogent for its application when the separate examination of the wife is to be taken upon the alienation of the homestead, since, by the statute, the examination and acknowledgment are unnecessary to the operation of the conveyance, and are essentials which no attestation or other form of acknowledgment can supply. Without substantial compliance with the statutory requirements in respect to the separate examination, no title passes and no rights attach by which a conveyance can be established. . . . The acknowledgment in question was taken by a notary, who was a stockholder in the mortgagee association, and as such, under the plan of the association, he was entitled to participate in the profits arising from loans and from other sources. He had, therefore, a substantial interest in upholding the attempted mortgage security, which disqualified him to conduct or certify the separate examination and acknowledgment of Mrs. Hayes." The court cites with disapproval, *Cooper v. Association*, 97 Tenn. 285, 56 Am. St. Rep. 795, 37 S. W. 12, which held that, in such a case, the acknowledgment was voidable and not void. The fact that the notary was employed by the husband to negotiate the loan, was held not fatal to the validity of the acknowledgment taken before him, in *Daniels v. Larendon*, 49 Tex. 216.

2. **Acting Out of His County.**—An officer acting outside of his own county is incompetent to certify to an acknowledgment, and this is so though it appears from the face of the certificate that it was taken before him in his own county, which fact may be disproved by parol: *Edinburgh etc. Co. v. Peoples*, 102 Ala. 241, 14 South. 656; *New England etc. Co. v. Payne*, 107 Ala. 578, 18 South. 164.

#### f. New Acknowledgment.

1. **May Cure Defective Acknowledgment.**—Where the acknowledgment of the wife is defective, she may make a new one, with intent to cure the defect, and, when properly made and certified, it will render the conveyance valid, always providing that the rights of third parties have not intervened: *Cahall v. Citizens' etc. Assn.*, 61 Ala. 232; *Hood v. Powell*, 73 Ala. 171; *Van Cleave v. Wilson*, 73 Ala.

387. The subsequent acknowledgment has no retroactive force, but constitutes the instrument a valid conveyance on and after the proper acknowledgment: *Balkum v. Wood*, 58 Ala. 642, citing *McGuire v. Van Pelt*, 55 Ala. 344; and *Miller v. Marx*, 55 Ala. 322; *Smith v. Pearce*, 85 Ala. 264, 7 Am. St. Rep. 44, 4 South. 616.

Where the certificate of acknowledgment was defective as to the husband's, but good as to the wife's, release of the homestead, it was held in *Johnston v. Dunavan*, 17 Ill. App. 59, that a court of equity had no power to correct the certificate to conform to the statute. Nor is parol evidence admissible to supply defects in the certificate: *Scott v. Simons*, 70 Ala. 352.

**2. Made After Husband's Death.**—Where the wife does not acknowledge the conveyance till the death of the husband, it is of no effect whatever, as, without the acknowledgment, it is a nullity: *Parks v. Barnett*, 104 Ala. 438, 16 South. 136. In a similar case the court said: "It would be an anomaly, indeed, to hold under this state of law and fact that the widow, thus without alienable interest of any kind or to any extent in the land, could, by the mere acknowledgment of a deed, which was essentially a nullity when the heirs took a perfect title, defeat their rights, and in legal effect convey their lands unto third persons.

"We do not think it can be done. We apprehend that the power to give vitality to such a void conveyance, by after-acknowledgment, ceases whenever the estate, assuming the invalidity of the deed, has passed into third persons, or rights of third persons have attached to it. We cannot perceive that it can be material whether these third persons are heirs, devisees, purchasers or creditors, or whether their estates or rights have accrued by descent, devise, sale or judgment liens": *Richardson v. Woodstock Iron Co.*, 90 Ala. 266, 8 South. 7.

**g. Impeaching Officer's Certificate.**—It was held in *Cahall v. Citizens' etc. Assn.*, 61 Ala. 232, that the certificate of a notary could be impeached only by showing that the signature of the wife was forged, or that duress or fraud were used with the grantee's knowledge. It may also be impeached by parol by showing that the officer was acting outside of his county, or that the wife did not in fact appear before him: *Edinburgh etc. Co. v. Peoples*, 102 Ala. 241, 14 South. 656, citing *Barnett v. Proskauer*, 62 Ala. 486; *Grider v. American etc. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58, 12 South. 775.

Where the certificate is fair and regular on its face, the evidence, to impeach it, must be clear, convincing and satisfactory: *German Bank v. Muth*, 96 Wis. 342, 71 N. W. 361.

The requirements regarding the execution and acknowledgment of instruments alienating or encumbering the homestead are for the benefit of the husband and wife, and when signed and acknowledged

by both a third person cannot question the validity thereof: *Cobbey v. Knapp*, 23 Neb. 579, 37 N. W. 485.

**h. Estoppel in Acknowledgments.**—The rules of estoppel in regard to acknowledgments are the same as those arising from the instruments themselves and heretofore discussed in IX and XII, b, herein.

Estoppel cannot supply the place of signing and acknowledging the instrument, where required by statute: *Davis v. Thomas* (Neb.), 92 N. W. 187. So where the wife is not examined separate and apart, the husband is not estopped to claim the land as homestead: *Slappy v. Hanners* (Ala.), 33 South. 900, and cases cited. See, also, *Alford v. Lehman*, 76 Ala. 526. And where the husband told the mortgagee that the justice of the peace had taken the acknowledgment in his own county, such not being the fact, he was held not to be estopped: *New England etc. Co. v. Payne*, 107 Ala. 578, 13 South. 164.

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## IN RE NOON'S WILL.

[115 Wis. 299, 91 N. W. 670.]

**WILLS, REVIVAL OF.**—The Operation of a Revocatory Clause in a will is immediate and absolute, and the fact that such will is destroyed, or cannot be found after the death of the testator, does not revive the former one. (p. 945.)

**WILLS, REVIVAL OF.**—A Will Once Revoked, to be revived, must, notwithstanding the intention of the testator, either be re-executed or adopted by some subsequent writing executed as the statute prescribing the manner for the execution of wills requires. (pp. 945, 946.)

Patrick Noon executed his will, and left it with the county judge. Subsequently, he withdrew the will from the custody of the judge, and had another will drawn with a clause revoking all former wills. Some time after this he left a package with the county judge, which, on being opened after his death, was found to be the first will. The second will was never found. From a decree denying the probate of the will deposited with the county judge, this appeal is taken.

William Smith, for the appellants.

William G. Wheeler, for the respondents.

301 **BARDEEN, J.** Both the county and circuit courts found that the second will executed by the deceased contained

a clause revoking all former wills. This fact is challenged by the appellants, but, inasmuch as all the testimony in the case on that subject is to the effect that such a clause was contained therein, we cannot disturb the finding. Section 2290 of the Statutes of 1898 provides, in substance, that no will shall be revoked unless by burning, tearing, canceling, or obliterating the same with intention to revoke, or by some other will or codicil in writing, executed as the law requires. Therefore, where a second will is drawn and executed with the formality required by the statute, and containing an unlimited revocatory clause, all former wills are wiped out and held for naught. The operation of the revocatory clause is immediate <sup>302</sup> and absolute. It is an act done solemnly and deliberately for present effect, and not one contemplating that future circumstances are to determine whether it shall have force. As stated by the court in *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799: "It operates at once, and does not apply as a mere contingent caveat against the objects at which it aimed." The addition of the revocatory words is a mode of immediate cancellation of the former will, and renders it totally inoperative as a testamentary instrument: See *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 64 N. W. 455; *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; *In re Goods of Hodgkinson*, [1893] Prob. Div. 339. By the great weight of authority in this country the destruction or revocation of the subsequent will containing the revocatory clause does not have the effect of reviving the former will: *Cassoday on Wills*, sec. 386, and authorities cited. Therefore the fact that the second will drawn by the testator was destroyed, or could not be found after his death, did not revive or give legal vitality to the former one.

The question next arises whether there is anything in the case to show that the former will has been revived in such a way as to warrant the court in admitting it to probate as a legal will. The county court decided that, although the testator may have filed the trust will with intention to revive the same, such act was not such a re-execution or republication as would operate to give it new life. The circuit court negatived the intent to revive, and found that the deposit of the first will with the county judge was through inadvertence or mistake. There is considerable evidence in the record to justify the findings of the circuit court, but we prefer to consider the case upon the facts as found by the county judge. We start with the assumption that the first will had been duly revoked,



and was not revived by the loss or destruction of the second. The first will was then without any legal validity. The situation was the same as though it had never been written. Section <sup>303</sup> 2282 provides that no will made within this state since January 1, 1896 (except nuncupative wills), shall be effectual to pass any estate, unless it be in writing, signed by the testator, or by some one authorized by him, and attested in the presence of the testator by at least two witnesses in the presence of each other. This court has decided that it is not necessary to the validity of a will that the witnesses thereto should know the nature of the instrument they are signing; nor is it necessary to the probate thereof that they should testify that the testator declared it to be his will: *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Skinner v. American Bible Soc.*, 92 Wis. 209, 65 N. W. 1037. The will, however, must be executed in substantial conformity to the statutory requirements, to be valid. The first will having become legally dead by revocation, we can see no way in which it could be revitalized except by some act which the law recognizes as being equivalent to execution under the statute. A codicil or subsequent writing adopting the former will, duly executed, or a re-execution of the old will with the required formalities, would undoubtedly revive it: See *Skinner v. American Bible Soc.*, 92 Wis. 209, 65 N. W. 1037; *Flood v. Kerwin*, 113 Wis. 673, 89 N. W. 845. Any act short of that would lead to confusion, and open the door to fraud. The legislature, having seen fit to prescribe in definite terms the manner in which a will shall be executed to be valid, have indicated a policy which ought not to be frittered away by evasions or exceptions. We are aware that there are cases in the books and cited by appellants' counsel which say that the question of reviving a will is simply one of what the testator intended. That question, no doubt, may be involved in many cases; still it cannot be permitted to override or annul plain statutory requirements. To make a valid testamentary disposition of property, there must be substantial conformity to all statutory requirements. We believe the better and safer rule <sup>304</sup> to be to require that a will once revoked, to be revived, must either be re-executed or adopted by some subsequent writing, executed as the statute requires: *Gary on Probate Law*, sec. 172.

By the Court. The judgment is affirmed.

*A Former Will is not Revived*, according to most authorities, by the destruction or revocation of a second will: See *Stewart v. Mulholland*, 88 Ky. 38, 21 Am. St. Rep. 320, 10 S. W. 125; *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393; monographic notes to *Pickens v. Davis*, 45 Am. Rep. 327-344; *Harwell v. Lively*, 76 Am. Dec. 652-656. On the republication of revoked wills, see the monographic note to *Matter of Stickney*, 76 Am. St. Rep. 249-262.

*A Testator Cannot Reroke* his will, notwithstanding his intention, except by a writing signed and attested in the manner provided for the execution of the will itself: *Howard v. Hunter*, 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. 638. But see *Billington v. Jones*, 108 Tenn. 234, 91 Am. St. Rep. 751, 66 S. W. 1127, and consult the monographic note to *Graham v. Burch*, 28 Am. St. Rep. 350, 351.

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## McMILLAN v. SPIDER LAKE SAWMILL AND LUMBER COMPANY.

[115 Wis. 332, 91 N. W. 979.]

**MASTER AND SERVANT.**—An Employee Assumes the Risk if, while unloading logs, he steps backward, to get out of their way as they roll from the car down a bank to the mill pond, falls in a hole which anyone could see, and is killed by the logs rolling over him. (p. 948.)

**DEATH.**—Nonresident Alien Relatives of a deceased are not entitled to the benefits of the Wisconsin statute giving a right of action for wrongful death. (p. 952.)

Action to recover for negligent killing of plaintiff's intestate. From a judgment of nonsuit, the plaintiff appeals.

W. P. Crawford and Crownhart & Foley, for the appellant.

Ross, Dyer & Hile, for the respondent.

334 CASSODAY, C. J. 1. It appears from the record, and is undisputed, that the deceased was thirty-six years of age, and a strong, healthy man, and had worked in the woods for about sixteen years, and had been in the employ of the defendant in the logging business as a teamster for a year. On the morning of July 6, 1900, he was set at work unloading logs from the cars upon the landing, and continued such work until he was killed in the forenoon of July 7, 1900. During that time he had assisted in unloading something like a dozen train loads of logs. The cars were twenty feet or more long, and

the logs were about the same length. The facts attending the accident, as stated by the plaintiff's counsel, are to the effect that at the time of the accident four cars were brought in the train; and that, as the train was being pulled onto the banking ground, the deceased hooked the trip line onto the fit hook so as to fasten the wrapper chain, and then, when the car was pulled ahead and set in place to be unloaded, he walked forward, and took hold of the trip line, and while standing near the end of the car next to the engine he gave the trip line a jerk, unfastening the wrapper chain, and, while stepping back to get out of the way he stepped into a hole about three or four feet deep, and fell to the ground, and before he could get up the logs rolled off the car and over him, and injured him so that he died about three hours afterward. The soil appears to have been a sandy slope from the railroad track back to the mill pond. The hole was three or four feet across the top, and three or four feet deep, and about two feet wide at the bottom. A brother of the deceased, who was sworn as a witness in behalf of the plaintiff, testified to the effect that anybody who looked at the hole could see it; that it was at least two feet down to the bank, and that anybody could see that who looked at it. The law applicable to such a state of facts is too well settled to require discussion: *Sladky v. Marinette* 335 L. Co., 107 Wis. 250, 260, 261, 83 N. W. 514, and cases there cited; *Williams v. J. G. Wagner Co.*, 110 Wis. 456, 86 N. W. 157; *Kreider v. Wisconsin etc. Pulp Co.*, 110 Wis. 645, 657-659, 86 N. W. 662. We must hold that the deceased assumed the risk.

2. It also appears from the testimony of the deceased's brother that the deceased left no issue, and was unmarried, and that his father was dead; that his mother was still living in Canada, where she had lived for many years; that she had no property; that the deceased had been accustomed to send his mother ten dollars a month when he could spare it; that she never lived in nor became a citizen of the United States; that his father lived nearly all his life at the same place where his mother did, and that he did not think he was ever a citizen of the United States. Upon such undisputed evidence it is claimed on the part of the defendant that under our statute this action cannot be maintained for the benefit of the mother of the deceased, a nonresident alien. The plaintiff claims a right to recover under sections 4255, 4256 of the statute. The

true meaning of those sections has been so fully and so recently considered by this court as to require nothing further to be here said, except to state the result and the application to the case at bar. Thus it has been held that: "The right of action given by [those sections] to certain beneficiaries therein named is personal, and the damages are limited to a mere indemnity for the pecuniary injury resulting therefrom to such beneficiary, and the action therefore does not survive the death of such beneficiary, but abates upon his death, and cannot be revived in favor of his administrator": *Schmidt v. Menasha W. W. Co.*, 99 Wis. 300, 74 N. W. 797.

So it has been held that: "The liability created by section 4255 of the Statutes of 1898, in case of the death of a person by an actionable injury for which such person could have recovered damages if death had not ensued, is for the benefit of certain relatives of the decedent mentioned in section 4256 of the Statutes of 1898, and in default of such relatives <sup>336</sup> there is no liability": *Brown v. Chicago etc. Ry. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771.

In that case it was further held that such right of action is separate and distinct from "the right of action for an injury to the person which survives under section 4253," even though death ensue from the injury: See, also, *Hubbard v. Chicago etc. Ry. Co.*, 104 Wis. 160, 76 N. W. 855, 80 N. W. 454; *Staefler v. Menasha W. W. Co.*, 111 Wis. 483, 487, 87 N. W. 480: Here the contention is that the plaintiff, as the personal representative of the deceased, has the right to recover damages for the pecuniary loss which his mother sustained by reason of his death, notwithstanding such right of action did not survive under section 4253. Did the sections of the statutes thus relied upon give such right of action for the benefit of such non-resident alien? The question is not whether the legislature had power to give such right of action, but whether the sections relied upon did give such right of action. It is claimed that the right "to maintain an action and recover damages" is given by the statute in general terms, and is broad enough to include aliens. The constitution declares that "no distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property": Const., art. 1, sec. 15. As indicated, the sections in question have no reference to the possession, enjoyment, or descent of property, nor the rights of property, where the death is in-



stantaneous or without conscious pain, but simply give a new right of action, outside and independent of property. It has been held in England that "prima facie, and unless the contrary be expressed or be implied from the absolute necessity of the case, every legislature must be presumed to have intended by its enactments to regulate the rights which should subsist between its own subjects, and not to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights": *Cope v. Doherty*, 4 Kay & J. 367. To the same effect is the *Zollverein*, 1 Swab. 96; *Jefferys v. 337 Boosey*, 4 H. L. Cas. 815. "It is conceded," said Marshall, C. J., "that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects as citizens": *Rose v. Himely*, 4 Cranch, 279. Mr. Story states the same rule thus: "It is plain that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its jurisdictional limits, and the latter only while they remain therein": *Story on Conflict of Laws*, secs. 7, 20, 98, 278.

The general rule is that statutes are "presumed to have no extraterritorial force": *Endlich's Interpretation of Statutes*, sec. 169. The same author says that: "In general, statutes must be understood as applying to those only who owe obedience to the legislature which enacts them, and whose interests it is the duty of that legislature to protect; that is, its own subjects, including in that expression not only natural-born and naturalized subjects, but also all persons actually within its territorial jurisdiction; but that, as regards aliens resident abroad, the legislature has no concern to protect their interests, any more than it has a legitimate power to control their rights. In this view it would be presumed, in interpreting a statute, that the legislature did not intend to legislate either as to their rights or liabilities; and to warrant a different conclusion the words of the statute ought to be express, or the context of it very clear": *Endlich's Interpretation of Statutes*, sec. 176.

Upon this principle, and under a statute similar to ours, it was held in Pennsylvania that "a nonresident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son": *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525. 59 Am. St. Rep. 676, 37 Atl. 558. In that case the court used this language: "Our

statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged <sup>338</sup> for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit of the statute that we cannot adopt it": *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 528, 529, 59 Am. St. Rep. 676, 37 Atl. 559.

So it has been held in a case arising in Colorado that "nonresident aliens are not entitled to the benefit of the Colorado statute giving a right of action for death by wrongful act to the next of kin of the deceased and cannot maintain an action thereunder": *Brannigan v. Union G. M. Co. (C. C.)*, 93 Fed. 164.

Counsel for the plaintiff cite and rely upon *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94; *Dennick v. Railroad Co.*, 103 U. S. 11; *Vetaloro v. Perkins (C. C.)*, 101 Fed. 393. In the first of these cases it was held that "a statute cannot impose duties upon a nonresident alien, but it may confer rights upon him." It is conceded by all that the legislature may confer such right of action upon nonresident aliens, but the question is, Has it done so by the general language employed in the statutes relied upon? In that case, Holmes, C. J., uses this language: "Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employé himself if the harm had been less, and by his representative if it had been equally great but the death had been attended with pain. In the latter case there would be no exception to the right of recovery if the next of kin were nonresident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical, and when the different provisions are part of one scheme": *Mulhall v. Fallon*, 176 Mass. 269, 79 Am. St. Rep. 309, 57 N. E. 387.

In other words, that learned court puts such right of action in favor of the surviving relative, having no reference to the possession, enjoyment, or descent of property, upon the same <sup>339</sup> footing with a right of action for damages which the de-

ceased might have maintained had death not ensued, and which would have survived his death for the benefit of his estate, and hence has reference to the enjoyment or descent of property. As indicated, this is in direct conflict with the ruling of this court, where it is held that the right of action which survives the death for the benefit of the estate of the deceased is separate and distinct from the right of action for the loss to surviving relatives. The one has reference to property, or the rights of property, of the deceased. The other has reference only to the loss sustained by the surviving relatives. The Illinois case cited follows and adopts the reasoning of the Massachusetts case cited. In *Vetaloro v. Perkins*, 101 Fed. 393, the right of action arose under the statute of Massachusetts, one section of which is quoted, from which it appears that the two rights of action are put upon the same footing. That statute declares, in substance, that "where an employé is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer," the surviving relative "may maintain an action for damages therefor, and may recover in the same manner and to the same extent as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered": *Vetaloro v. Perkins* (C. C.), 101 Fed. 349. This broad difference between our statutes and the statutes of Massachusetts makes the adjudication in cases arising under that or any similar statute inapplicable to the case at bar. The cause of action in *Dennick v. Railroad Co.*, 103 U. S. 11, arose under a statute of New Jersey, and the action was brought in New York, and removed to the federal court, and was otherwise distinguishable. The precise question here involved was not there considered; but it was held that the plaintiff could recover. There are, however, numerous cases to the contrary. A few only are cited: *Woodard v. Michigan etc. R. R. Co.*, 10 Ohio St. 121; *Texas etc. Ry. Co. v. Richards*, 68 Tex. 375, 4 S. W. 627; *St. Louis etc. Ry. Co. v. McCormick*, 71 Tex. 660, 9 S. W. 540; *De Harn v. Mexican Nat. R. Co.*, 86 Tex. 68, 23 S. W. 381; *Mexican Nat. Ry. Co. v. Jackson*, 89 Tex. 107, 59 Am. St. Rep. 28, 33 S. W. 857. We must hold that the sections of the statutes relied upon do not give to non-resident alien relatives of one who is instantly killed, or who dies without conscious pain, a right of action for the loss sustained by reason of such death.

By the Court. The judgment of the superior court for Douglas county is affirmed.

*A Nonresident Alien* mother may recover in the courts of Massachusetts or Illinois for the wrongful death of her son: *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386. But see *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558.

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### HORTON v. WYLIE.

[115 Wis. 505, 92 N. W. 245.]

**RECKLESS USE OF FIREARMS by Boys.**—If, after two boys have been alternately pointing an uncocked revolver at each other in play, one points it at the other at full cock, and the latter strikes it up with his hand, when it is discharged, injuring him, the former is liable in damages, when he was violating the law forbidding minors to go armed with a revolver and forbidding anyone to point a gun or pistol at another. (p. 954.)

Action by the plaintiff for injuries from the discharge of a revolver in the defendant's hands, the ball penetrating his skull. The parties were boys, each about thirteen years old. On the day of the injury they drove some cows to pasture, the defendant having a revolver in his possession, and on reaching the pasture amused themselves by alternately pointing it at each other and playing "cowboy." Finally the defendant pointed it at the plaintiff at close range and at full cock. Previously it appears not to have been cocked. The plaintiff struck up the revolver with his hand, and at the same time it was discharged. From a judgment of eighteen hundred dollars the defendant appealed.

Ryan, Hurley & Jones, for the appellant.

Brown, Pradt & Genrich, for the respondent.

**507** WINSLOW, J. The trial judge charged the jury, in substance, that under the facts shown the plaintiff was entitled to recover his actual damages, because the defendant was at the time of the shooting violating the law of this state forbidding a minor from being armed with a dangerous weapon (*Sanborn & Berryman's Annotated Statutes*, sec. 4397b), by reason of which violation **508** the injury complained of occurred. This instruction was duly accepted to, and the defendant, on the other hand, requested the following instruction, which was refused, and exception taken: "If the jury are satisfied from the evidence that



the boys, Ralph Wylie and Clark Horton, at the spot where the shot occurred, had the revolver there in common, both taking part freely in the use of it for the purpose of play and amusement, and for no other purpose, and with no intent on the part of either, and that the shot was the result of pure accident, caused by the boy, Clark Horton, throwing up his hand and striking the revolver and causing it to explode, and thus causing the whole of the injury complained of, the jury should find for the defendant."

The rulings of the trial judge were plainly right. The case is ruled by the case of *Evans v. Waite*, 83 Wis. 286, 53 N. W. 445, where it was held that the accidental discharge of a revolver in the hands of a minor, by which another was injured, was an actionable wrong, and that a verdict for the plaintiff for compensatory damages was properly directed on such a showing, notwithstanding the fact that the plaintiff knew that the defendant was armed, and consented thereto. The present case is even stronger than *Evans v. Waite*, 83 Wis. 286, 53 N. W. 445, because in this case the defendant was not only violating the law forbidding minors to go armed with a revolver, but was also violating section 4391 of Sanborn & Berryman's Annotated Statutes, which makes it unlawful for anyone to intentionally point a gun or pistol at another.

There are some assignments of error based upon the rulings upon evidence, but they are plainly not well founded, and we do not deem them of sufficient importance to justify detailed discussion.

By the Court. Judgment affirmed.

Bardeen, J., took no part.

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*One Who Points Firearms* at another is answerable in damages for the consequences: *Bahel v. Manning*, 112 Mich. 24, 67 Am. St. Rep. 381, 70 N. W. 327. If a homicide results, he may be prosecuted for manslaughter: See the monographic note to *Johnson v. State*, 90 Am. St. Rep. 581, 582.

*That an Infant* is liable for his torts, see *Nash v. Jewett*, 61 Vt. 510, 15 Am. St. Rep. 931, 18 Atl. 47; *Lowery v. Cate*, 108 Tenn. 54, 91 Am. St. Rep. 744, 64 S. W. 1068; and that his parents ordinarily are not, see the monographic note to *Johnson v. Glidden*, 74 Am. St. Rep. 801-808.

# MORRISON v. CITY OF EAU CLAIRE.

[115 Wis. 538, 92 N. W. 280.]

## MUNICIPAL CORPORATIONS—Presentation of Claims.—

The procedure prescribed by a city charter for presenting claims against the city to the council, and appealing therefrom to the circuit court in case of disallowance, is essential to jurisdiction over the subject matter of any claim of the character required to be presented. (p. 956.)

## MUNICIPAL CORPORATIONS—Obstruction on Sidewalk.—

A city's failure to remove from a sidewalk a pile of rubbish, not placed there by its act or consent, is but an omission of its statutory duty to keep the highway reasonably safe for travel, and creates no common-law right of action, as for a nuisance, in favor of a traveler injured thereby. (p. 958.)

**MUNICIPAL CORPORATIONS—Presentation of Claims.**—In an action against a city for injuries sustained from a pile of rubbish on the sidewalk, a complaint which does not allege compliance by the plaintiff with the city charter in filing his claim and appealing from its disallowance to the circuit court, does not state facts sufficient to constitute a cause of action. (p. 961.)

**MUNICIPAL CORPORATIONS—Presentation of Claims.**—A provision in a city charter excluding a claimant for damages caused by a defective street from original suit by ordinary procedure in the courts, and requiring him to reach such forum through the medium of presentation to the city council and appeal from its decision, hampered by various restrictions, including a bond for costs, is constitutional. (p. 962.)

**MUNICIPAL CHARTER—Conflicting Provisions.**—A provision of a city charter, creating the municipal corporation with general powers, including that of suing and being sued, is controlled and limited by a subsequent provision that upon certain classes of claims it shall be sued only on specified conditions and in a specified manner. (p. 962.)

**MUNICIPAL CORPORATIONS—Presentation of Claims.**—A provision of a city charter requiring claims against the city to be presented to the council, and an appeal, in case of disallowance, to be taken to the circuit court, is not invalid as not providing a scheme of practice by which issue can be joined and trial of merits had. (p. 962.)

**STATUTES.**—Repeal by Implication, in the absence of a clear intention, can be indulged only so far as unavoidable. (p. 963.)

Appeal from order sustaining demurrer to complaint. It alleged notice of the injury to the city on the eighteenth day of March; that on June 22d plaintiff filed a paper describing his accident and injuries, but that it was not filed as a formal claim under any provision of the charter, but merely to enable a settlement without litigation; that on July 17, 1901, the council passed a resolution wholly disallowing plaintiff's claim; that he has at all times been without means or property to procure

a bond for costs to enable him to appeal from the disallowance of the claim the manner provided by the charter of the defendant.

The grounds of demurrer were, that the complaint did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction either of the person of the defendant or of the subject of the action; that plaintiff has not legal capacity to sue; and that the action was not commenced within the time limited by law, namely, the Eau Claire charter, specifying sections 22, 23, 24, 25 and 26 of subchapter 7, of that act (viz., Laws 1889, c. 184).

The charter of the city of Eau Claire, by sections 22-25, subchapter 7, substantially requires that all claims and demands, either *ex contractu* or *ex delicto*, against the city, shall be first filed with the city clerk for action by the common council, and in case of disallowance or failure to act, which is made tantamount to disallowance, for appeal to the circuit court within twenty days; to be taken by giving a notice, accompanied by a bond with sufficient surety, conditioned for the faithful prosecution of the appeal and payment of all costs adjudged against the appellant. These sections also provide that no suit shall be otherwise brought, and that the determination of the common council shall be final and conclusive, and a perpetual bar to any action in any court founded on such claim, except by said method of appeal. Section 26 further provides that the city shall not be liable, nor shall any action be maintained against it, for any damages or claims founded upon any injury caused by reason of any defects or any insufficiency or want of repair of any bridge, sluiceway, road, sidewalk, or street in said city, unless the same be commenced by filing the claim with the city clerk within ninety days from the time of the accident.

H. H. Hayden and H. B. Walmsley, for the appellant.

James Wickham, for the respondent.

**541** DODGE, J. The first question in natural sequence is whether the circuit court had an jurisdiction over plaintiff's demand, it not having been filed with the city clerk nor brought into court by appeal. It would seem that this question has been answered beyond further debate by a line of cases in this court reaching from *Koch v. Ashland*, 83 Wis. 361, 53 N. W. 674, up to one of its very latest utterances. Those cases are *Mason v. Ashland*, 98 Wis. 540, 74 N. W. 357; *Telford v. Ash-*

land, 100 Wis. 238, 75 N. W. 1006; Seegar v. Ashland, 101 Wis. 515, 77 N. W. 880; Morgan v. Rhinelander, 105 Wis. 138, 81 N. W. 132; Oshkosh W. W. Co. v. Oshkosh, 106 Wis. 83, 81 N. W. 1040; Miller v. Crawford Co., 106 Wis. 210, 82 N. W. 175; Oshkosh W. W. Co. v. Oshkosh, 109 Wis. 208, ante, p. 870, 85 N. W. 376; O'Donnell v. City of New London, 113 Wis. 292, 89 N. W. 511. In all those cases it is held that charters similar in general effect to that before us, including the general city charter, make procedure by presentation to the council and appeal therefrom to the circuit court, by steps in such statutes prescribed, essentials of jurisdiction over the subject matter of any claim of the character required to be presented. The remark in Davis v. Appleton, 109 Wis. 580, 85 N. W. 515, that a charter provision, differing in some respects at least from that now before us, was to be deemed only a statute of limitation, was made, not with reference to a claim required to be presented before the council, but in an action for an injunction against the erection of an unlawful structure by the city upon plaintiff's lands. If the language of that case might be construed as applicable to attempted suits upon claims against the city based on liability created by statute, it was purely obiter, and cannot overcome the direct authorities above cited. Under these decisions there can be no doubt that the demurrer, being founded, as one of its grounds, upon the want of jurisdiction, was properly sustained, if the legislation embodied in chapter 184, Laws of 1889, known as the "Eau Claire charter," be <sup>542</sup> valid—a question which may be considered later. This view is in no wise inconsistent with the further holding by this court that in actions against cities not founded upon any common-law right, but upon rights created and existing only by statute, such steps by way of presentation of claim and appeal from disallowance are essential elements and conditions of the existence of the cause of action as well, so that they, or many of them, are raised by a demurrer asserting merely insufficiency of facts. They may be both conditions of the court's jurisdiction and of the existence of any right of action in the plaintiff.

2. The next question in logical sequence is whether the complaint states facts sufficient to constitute a cause of action. Were we to take the appellant at his word, and assume, as he asserts, that the complaint does not state any cause of action created by section 1339 of the Statutes of 1898, for an in-



sufficiency or want of repair in any street, a negative answer to this inquiry would be readily reached. Certainly no other cause of action is stated. Appellant's contention is that he has attempted to bring suit for damages resulting from the maintenance of a nuisance by the city, because his injury results from the presence of an unlawful extraneous substance in the street not any part of it, namely, a pile of mortar and bricks or other debris, but he does not charge the city with any responsibility, either by act or consent, for such substance being placed there originally. He contents himself with asserting its presence, and the city's failure to remove it from the street. This is no more than an omission of the city's statutory duty to keep the highway within its limits reasonably safe for travel thereon, obviously a governmental function performed on behalf of the state at large, from which the municipality derives no pecuniary benefit. From such omission, but for express statute, arises no right of action in favor of one toward whom this mere governmental duty is owed, such as a traveler: *Stilling v. Thorp*, 54 Wis. 528, 532, 41 Am. Rep. 60, 11 **543** N. W. 906; *McLimans v. Lancaster*, 63 Wis. 596, 600, 23 N. W. 689; *Reed v. Madison*, 83 Wis. 117, 177, 53 N. W. 547; *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420. Counsel, with not very wise expenditure of industry, has collected numerous decisions by other courts, notably of the United States, tending to a different view. These can hardly have weight, however, against the fully established rule in this state as to the character and liabilities of municipal corporations created by the legislature of Wisconsin under our own constitution. Such alien decisions distinguishing cities and villages from towns and counties with reference to their common-law liability to suit for neglect of duty to maintain safe highways have long since been fully weighed by this court, and have been repudiated in favor of the contrary view maintained in Massachusetts, whence we in so large measure took our highway laws: *Daniels v. Racine*, 98 Wis. 359, 84 N. W. 420.

Upon the text that a pile of rubbish in a street is an obstruction and therefore a nuisance for which liability rests on the city at common law, appellant cites, with much verbosity of quotation, an array of decisions which, on examination, prove to be without relevancy. Thus, in *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407, a roller left in the street by the city was held a nuisance for which liability existed.

That case, with *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435, where was express license to place wild-animal exhibit in street, are illustrations of city's liability to the traveler for creating nuisances in the street, not as a part thereof, nor in process of performing, though improperly, its duty of making or maintaining the street. They present instances of the doing of unlawful acts, and are distinguished from improper or negligent doing of the lawful act of constructing the highway, by such cases as *Kollock v. Madison*, 84 Wis. 458, 164, 54 N. W. 725, *Hein v. Fairchild*, 87 Wis. 258, 58 N. W. 413, and *Ziegler v. West Bend*, 102 Wis. 17, 78 N. W. 164—in <sup>544</sup> all of which the city's liability rested wholly on the statute (Stats. 1898, sec. 1339), although the defect consisted in one case of a rope stretched across, in another of a dangerous excavation, and in the third of an improperly or negligently constructed manhole cover, all put in place by the city, but in the course of street work. The principle of the roller and bear-show cases is still better illustrated by *Neuert v. Boston*, 120 Mass. 338, where the city, in performing its governmental duty of operating a fire department, had safely maintained a telegraph wire across the street, supported on one side by a building belonging to the city. In removing this building, the city, acting as owner, loosened the wire and lowered it, so as to endanger and injure a traveler. The municipality was held liable because in creating this perilous condition it was not exercising its governmental function, either in maintaining streets or operating fire department. All such cases are obviously irrelevant, however, to that at bar, in that there the city affirmatively created the nuisance, while here nothing of the sort is charged.

Another class of cases urged is illustrated by *Winchell v. Waukesha*, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668, and *O'Donnell v. City of New London*, 113 Wis. 292, 89 N. W. 511, in the latter of which liability of the city to an adjoining property owner from such construction of a highway as to obstruct a water course was assumed and in the former the city was declared liable to the same remedies as an individual for polluting a stream with sewage, to damage of lower riparian owner. These cases mark a distinction noted in *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420, namely, that, while a municipality is not to be held liable for damages resulting from mere performance of governmental functions, such exemption applies only against those toward whom the act is governmental,

not against those toward whom the city's attitude and relation is that of a proprietor. Obviously, while a municipality is performing a function of general state government <sup>545</sup> in making highways, erecting and maintaining schoolhouses, and constructing sewer systems and the like, it also becomes an owner of property in so doing, and it is bound to govern its management of such property by substantially the same rules as other proprietors similarly situated. The adjoining land owner has the same rights to lateral support for his soil, to the uninterrupted flow of any watercourse, as if his neighbor were a private individual, and in respect to such rights a city's attitude is that of a proprietor, and not merely governmental. Toward such persons the city does an unlawful act when it dams a watercourse by a highway, constructs a sewer so as to empty onto them, or excavates away their lateral support. It does not merely do a lawful thing in an improper or negligent manner, as distinguished in *Ziegler v. City of West Bend*, 102 Wis. 17, 78 N. W. 164. In the case at bar, of course, the relation of the defendant to plaintiff was purely governmental. He was a traveler using the highway facilities which the city, as a branch of the state government, was required to provide.

Another copious collection of cases are cited to sustain the proposition that the city is liable for an injury resulting from the presence of extraneous matter in the street, constituting what appellant is pleased to declare an obstruction, and not a mere insufficiency or want of repair. Such cases cited, and similar ones which might have been, are *Barstow v. City of Berlin*, 34 Wis. 357; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Raymond v. Sheboygan*, 70 Wis. 318, 35 N. W. 540; *Kollock v. Madison*, 84 Wis. 458, 464, 54 N. W. 725; *Cairncross v. Pewaukee*, 86 Wis. 181, 56 N. W. 648; *Hein v. Village of Fairchild*, 87 Wis. 258, 58 N. W. 413; *Ziegler v. City of West Bend*, 102 Wis. 17, 78 N. W. 164. That these cases declare the liability of a municipality for injuries resulting from such "obstructions" is unquestionable, but not that such liability rests on it by common law. Examination of all of them will <sup>546</sup> leave no room for doubt that what they in fact decide, albeit not always expressly, is that in section 1339 the words, "insufficiency or want of repair," are not used in so restrictive a sense as to include only inadequacy of original construction and subsequent deterioration, but also include such obstacles and defects as render the use of the highway

dangerous to one exercising ordinary care, provided, of course, the municipality has notice of defect and opportunity to remove the same, and, as a result of such construction, that liability is imposed by that statute.

Thus we are brought to consider whether a cause of action is stated under the statutes of this state. No serious question is raised but that the complaint alleges conduct of the city out of which a cause of action might develop. The allowance of a dangerous condition of its street, after notice, and plaintiff's injury by reason thereof, sufficiently appear to arouse defendant's liability under section 1339, and the notice of such injury required by that section was duly given. The complaint, however, fails to allege either that plaintiff has complied with section 22, subchapter 7 of the Eau Claire charter, by filing any claim with the city clerk and taking appeal in statutory manner from disallowance, and it of course further fails to show compliance with the requirement of section 26, subchapter 7, that such claim be filed within ninety days after the injury. That such steps constitute conditions imposed by the legislature upon the right to damages which it grants, and upon the municipal liability which it creates, is now too well settled as the law of this state to leave room for further debate: *Watson v. City of Appleton*, 62 Wis. 267, 22 N. W. 475; *Koch v. Ashland*, 83 Wis. 361, 53 N. W. 674; *Daniels v. City of Racine*, 98 Wis. 649, 74 N. W. 553; *Schaefer v. Fond du Lac*, 99 Wis. 333, 340, 74 N. W. 810; *Ziegler v. West Bend*, 102 Wis. 17, 78 N. W. 164; *Harris v. Fond du Lac*, 104 Wis. 44, 80 N. W. 66. Under such weight of authority it cannot be doubted that there is failure of facts sufficient to constitute <sup>547</sup> cause of action, because the claim has not been filed with the city clerk at all, as required by said section 22, and it is immaterial whether the further requirement of section 26, that it be filed within ninety days after the injury, is valid or not—a question discussed at much length by appellant.

Appellant, however, attacks en masse and in detail the constitutional validity of the whole charter scheme of excluding a claimant against Eau Claire from original suit by ordinary procedure in the courts of the state, and requiring him to reach such forum through the medium of presentation to city council and appeal from their decision, hampered by various restrictions, including unlimited bond for costs. A discussion of such questions in the present case would, however, be purely



academic and inconclusive. If it were to be conceded that the constitution, either state or federal, restricted the legislative discretion over remedies for rights which exist independently of statute, no such limitation rests upon the discretion to impose terms and conditions upon rights or privileges existing only by virtue of legislative grant. As the legislature might withhold entirely both the right to damages and the right of action in court therefor, it may surely withhold it in part by imposing conditions.

Counsel for appellant seems to contend that section 1, subchapter 1, of the Eau Claire charter, which merely creates that community into a municipal corporation with the general powers thereof, including that of suing and being sued in any court, must so dominate section 22, subchapter 7, declaring that upon certain classes of claims and demands it shall be sued only on specified conditions and in a specified manner, that the latter can have no effect at all. This contention substantially reverses all rules of construction. It convicts the legislature of enacting all the elaborate detail of sections 22-26, subchapter 7, for no purpose and with no intent that they should be of any force; it gives to the general preponderance over special provisions, and it subordinates the later declarations <sup>548</sup> to the earlier. We cannot adopt this view. Sections 22-26, subchapter 7, were enacted for some purpose, and must be given effect, according to their words, within the special field of claims to which they apply, to control and limit section 1, subchapter 1.

Further objection is urged against these charter provisions that they provide no scheme of practice by which issue can be joined and trial of merits had. This may be unfortunate for the claimant if true, but its result is not to render invalid the legislative denial of right to sue in any other form. Counsel's apprehensions may be soothed, however, by the consideration that large numbers of such cases, under generally similar charter provisions, have reached issue, trial, judgment and payment, and, if a legislative purpose is apparent to give claimants a right to such results, our courts may be trusted to find means thereto.

Again, it is contended that chapter 471, Laws of 1889, permitting joinder of cities with others primarily liable for highway injuries, is in some features repugnant to these charter provisions, and therefore repeals them entirely. If irreconcilable repugnancy exists, it may become the duty of the courts

to decide which of these statutes controls, when a case arises presenting them in conflict. That can hardly be, however, until in some case of attempted joinder, of which we have nothing before us at present. We certainly discover no necessary purpose in chapter 471 to repeal the charter provisions in toto, and, in absence of that clear intention, repeal by implication can be indulged only so far as unavoidable. It is clear that chapter 471, providing for cases of joinder where other are liable, does not necessarily destroy the charter provisions in their application to a case like this, where no other liability is asserted and no joinder is attempted.

We find nothing else in the voluminous brief of appellant requiring discussion, or which tends to defeat the conclusions already reached, that the failure to file plaintiff's claim for **549** consideration by the city council, and to come into court by the process of appeal, are fatal alike to the jurisdiction of the court over the subject matter of his demand and to the existence of any cause of action in his favor against the defendant. Such conclusions being finally fatal to the complaint upon the demurrer, it follows that the order sustaining the demurrer was correct.

By the Court. Order appealed from is affirmed.

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*Whether There is a Common-law Liability* on the part of cities and counties for negligence is question upon which the authorities do not agree: See *Davis v. Ada County*, 5 Idaho, 126, 47 Pac. 93, ante, p. 166, and cases cited in the cross-reference note thereto.

*Charter Provisions* similar to those under consideration in the principal case are upheld in *Oshkosh Water Works Co. v. Oshkosh*, 109 Wis. 208, 85 N. W. 376, ante, p. 870, and note. See, also, *Cunningham v. Denver*, 23 Colo. 18, 58 Am. St. Rep. 212, 45 Pac. 356; note to *Commissioners v. Heaston*, 55 Am. St. Rep. 203-210; *Barrett v. Mobile*, 129 Ala. 179, 87 Am. St. Rep. 54, 30 South. 36.

**ST. CLAIR v. RUTLEDGE.**

[115 Wis. 583, 92 N. W. 234.]

**CORPORATIONS.—The President of a Corporation does not, by virtue of his office, possess authority to bind the company by contract.** (p. 968.)

**CORPORATIONS—Estoppel.—An Artificial Person is estopped from denying that its agents possess all the authority which it gives them the appearance of having, the same as a natural person.** (p. 968.)

**CORPORATIONS—Authority of President.—A Person Who Contracts with the president of a corporation pretending to act in its behalf is bound to know the extent of his powers; but this rule must be considered with reference to countervailing rules rendering it dormant when otherwise injustice would be done.** (p. 969.)

**CORPORATIONS—Authority of President.—A Corporation is Estopped from denying in any particular instance that its president has the power which it customarily has allowed him to exercise in the face of the public.** (p. 969.)

**CORPORATIONS—Authority of Officer.—Proof of Apparent authority of a corporate officer to contract in its behalf prima facie establishes actual authority so to do, and mere want of authority in fact will not relieve a corporation from the burden of a contract made in reasonable reliance upon such appearance of authority.** (pp. 969, 970.)

**CORPORATIONS—Authority of President.—What Will Evidence authority of the president of a corporation to bind it by contract must be considered with reference to the circumstance that such officer almost universally exercises the power of a general agent for his company.** (p. 970.)

**CORPORATIONS—Authority of President.—If the directors of a corporation for a long time fail to exercise their functions in directing corporate affairs, and leave them wholly to be looked after by the president, his authority to do the things he is apparently authorized to do is as binding upon the corporation as though conferred in the most formal manner.** (p. 970.)

**CORPORATIONS—President as General Agent.—The custom being general for presidents of corporations to act as general agents, to make contracts, to buy and sell property, and to generally do corporate business, evidence less strong is required to charge one holding out its president as having such authority than is required to charge a natural person to the same effect.** (p. 972.)

**CORPORATIONS—Authority of President.—When the president of a corporation is found from day to day in general charge of the company's affairs, it is conclusively presumed, as to innocent third persons, that he possesses all the powers of a general agent, and such other powers as he in fact has exercised for such a time as to charge the governing board of the company with notice thereof, and which appearance of power they have taken no means to protect the public from being imposed upon by.** (p. 972.)

**CORPORATIONS.—The Doctrine of Estoppel stands guard over the application of the doctrine limiting the powers of the**

president of a corporation, preventing, where the latter doctrine would otherwise lead to, injustice. (p. 972.)

**CORPORATIONS—President's Signature.**—When the president of a corporation signs a writing with the name of the corporation by himself, the inadvertent omission of his title of office does not affect the validity of the instrument. (p. 972.)

**CORPORATIONS.—The Written Evidence of a Corporate Contract** need not be sealed with the corporate seal or signed by the secretary of the corporation to give it validity, unless it is one required by statute to be so sealed and signed. (p. 973.)

**CORPORATIONS—Seal.—The Waiver of the Right to forfeit** to a corporation the title to real property is not a conveyance, and is not required to be executed under seal or signed by the secretary of the company. (p. 973.)

Tomkins & Tomkins and John G. Williams, for the appellant.

H. H. Hayden and H. B. Walmsley, for the respondent.

**585 MARSHALL, J.** Action to quiet title. The complaint is in the usual form. Defendant pleaded title to the timber upon land and an interest under a tax deed. The court, upon the evidence, found, on matters material to this appeal, in substance as follows:

1. October 12, 1893, and prior thereto and thereafter till the conveyance to plaintiff, the Peerless Iron and Land Company, a corporation, owned the lands in dispute, except as affected by transactions with defendant hereafter mentioned.

2. The corporation was organized in 1886, principally for the purpose of dealing in mineral lands and mining properties, prospecting and exploring for minerals, iron and other <sup>586</sup> ores, mining, smelting and manufacturing minerals, granting and acquiring mining options and leases, and platting lands.

3. By the articles of organization the president, in conjunction with the secretary, was empowered to make conveyances, contracts and agreements as directed by the board of directors, and perform such other duties as might be prescribed by the by-laws, and have general charge and supervisory control of the business and affairs of the company under and subject to the authority of the board of directors.

4. No by-law was passed or direction given to the president in regard to the transaction with the defendant hereafter mentioned, prior to the occurrence thereof.

5. The entire capital stock of the corporation was paid by a conveyance to it of certain lands.



6. C. T. Bowen was president of the corporation from August, 1886, to the spring of 1899.

7. From October 12, 1893, the president as such sold to defendant the pine, spruce, and tamarack timber, twelve inches or more in diameter at the stump, on the lands in question, with the privilege to cut and remove the same at any time before June 1, 1899, the timber then remaining to revert to the corporation, the sale being made by a writing signed by the president and the secretary.

8. November 1, 1893, the board of directors first acted in reference to the sale to defendant, at which time they ratified the same by a motion in the following words: "On motion the president and secretary were authorized and empowered to make sale of the pine on Peerless land in town 43—3 east in Ashland county, Wisconsin, and all contracts heretofore made by them in reference to such sale were ratified and confirmed."

9. Defendant did not know of such action till after the commencement of this action. From the time he purchased the timber he performed the condition imposed upon him in 587 regard to the land to pay one-half of the taxes on the land during the existence of his interest in the timber.

10. When said sale was made the corporation had no money with which to do business or pay the taxes upon its lands. The money received upon the sale was used, so far as necessary, to pay back taxes on the lands, and the balance was divided between the stockholders.

11. The taxes on the land, except one-half paid by defendant, were allowed to go delinquent from 1894 to 1900, during which time defendant obtained a tax deed on one-half interest in some of the land, which deed, however, is admitted to be void.

12. From about the year 1892 no business of any kind was done by the corporation. It in fact abandoned the purposes of its organization except as the same was attended to by the president, Mr. Bowen, all of whose acts were tacitly assented to by the corporation during such time. Shortly before March 28, 1896, defendant applied to the corporation, by letter addressed to its president, for an extension of time to June 1, 1902, to remove the timber from the land, upon condition of his continuing to pay one-half of the taxes until the timber should be removed.

13. Bowen, acting as president, with the acquiescence of one or more of the other directors, assented to such request, and by

a writing extending the privilege to remove the timber till June 1, 1902. The extension was signed in the following form: "Peerless Iron and Land Company, by C. T. Bowen," though Mr. Bowen in fact acted as president of the corporation in so signing the extension, the neglect to add the title, "President," being a mere inadvertence.

14. Had defendant not obtained the extension he would have removed the timber within the time allowed by his agreement with the corporation as it was originally made. He omitted to do so, relying on the extension referred to.

<sup>588</sup> 15. November 20, 1899, the corporation conveyed the lands in question by quitclaim deed to plaintiff for the sum of seven hundred and fifty dollars, he then having full knowledge of the transactions of Mr. Bowen, as president of the corporation, with defendant.

16. The corporation never in any way repudiated Bowen's transaction with defendant except by the act making the quitclaim deed.

17. For a long time prior to the making of the extension, Bowen was held out by the corporation to the public generally as having authority to do business of the character of that transacted with defendant, and defendant relied upon his appearance of authority in taking such extension and relying thereon.

Upon the facts so found and others not necessary to be considered in regard to any point made upon the appeal, the court found as a matter of law that the Peerless Iron and Land Company and its grantee, the plaintiff, were estopped from denying the authority of Bowen to make the extension of time for defendant to cut and remove the timber, and that he was the owner of the timber upon the land, of the character described in his purchase of October 12, 1893, with the right to remove the same at any time before June 1, 1902. The complaint was accordingly ordered dismissed with costs, and relief was granted defendant upon a counterclaim—pleaded in the answer, as regards tax claims on the lands, owned by him—of which no complaint is made on this appeal. Exceptions were duly filed to the findings of fact.

<sup>589</sup> Was the act of the president of the Peerless Iron and Land Company, in attempting to extend respondent's privilege to cut and remove the timber, *ultra vires*? That is the sole question for decision. It is useless to spend time endeavoring to test the matter by the law respecting what a president a

corporation cannot do by virtue of his office; that it gives him no right to make contracts binding on his company; that authority to that end in fact can only be conferred upon him by the articles of organization or some by-law or resolution passed by the board of directors, and that all persons dealing with a corporation are bound to take notice of the limitation upon its authority and notice of its articles of organization and by-laws. If the evidence warrants the finding that Bowen, for years prior to the making of the extension, was held out by the corporation as its general agent, and as having authority to do such acts as the one in question, it is bound thereby to the same extent as if authority were conferred in the most formal manner. That an artificial person is estopped from denying that its agents possess all the authority which it gives them the appearance of, the same as a natural person, is just as well established as the principle that the president of a corporation is not, ex-officio, its general agent or possessed of authority to make contracts binding upon it: *Ford v. Hill*, 92 Wis. 194, 53 Am. St. Rep. 902, 66 N. W. 115; *McElroy v. Minnesota P. H. Co.*, 96 Wis. 317, 71 N. W. 652; *Senour Mfg. Co. v. Clarke*, 96 Wis. 469, 472, 71 N. W. 883; *Northwestern Fuel Co. v. Lee*, 102 Wis. 426, 78 N. W. 584; *Interior W. W. Co. v. Prasser*, 108 Wis. 557, 84 N. W. 833; *Bullen v. Milwaukee Trading Co.*, 109 Wis. 41, 85 N. W. 115. If such were not the case the way would be open to easily invoke the salutary rule of law regarding ex-officio powers of corporate officers to perpetrate fraud. A general agent in fact of a corporation may be and commonly is its president, and when such is the case his official position is by no means a limitation upon his powers as such agent: *Ceeder v. Loud & <sup>590</sup> Sons L. Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575. As has often been said, intolerable mischief would result from requiring every person, at his peril, in dealing with the president of a corporation in a matter outside the scope of his duties as such, to first examine its records. The business world is not subject to any such dangers. The application of the doctrine of estoppel by courts has kept pace with the rapid development of corporate enterprise, so that, while ancient rules regarding limits upon powers of officers of corporations have not been abrogated, they are conclusively presumed to have been complied with or compliance to have been waived by the corporation, where justice so requires. Professor Thompson, in his work on Corporations (volume 4,

sections 4623, 4624), after reviewing a multitude of instances where the power of the president of a corporation was held to have been exceeded, used this language: "After such a list of negations upon the powers of the president of a business corporation, the inquiry will arise whether there are any legal grounds upon which persons dealing with such bodies through their chief officers are protected."

To that he suggests that a careful scrutiny of the various applications of the rule limiting the power of the president of a corporation will show that they are, as a whole, consistent with natural justice; that whenever such rule is invoked to perpetrate a wrong, there are many countervailing rules upon some of which the person threatened with injustice may generally securely plant himself. He mentions the following as well established:

1. "A corporation is estopped from denying, in the particular instance, that its president had the powers which it has customarily allowed him to exercise in the face of the public," 'under which a person, dealing with a corporation though its president, proves the latter's authority by proving that the corporation held him out to the public as possessing <sup>591</sup> the powers which he exercised in the given case, whereby it has become estopped as against an innocent person, from denying that he rightfully exercised those rights.' 2. A corporation cannot enjoy the benefits of a transaction and repudiate its responsibilities. Such enjoyment is deemed a ratification. 3. The presence of the corporate seal upon a paper purporting to be a corporate act, *prima facie* shows that the active agent of the corporation, in executing the paper, was duly authorized in the matter. 4. Proof of the authority of the president to act for his company in the particular transaction may be shown by an oral vote of the board of directors not made a matter of record, or otherwise by parol, and often equally well by circumstantial evidence.

Certainly, as this court has held on many occasions, the idea that every time a person deals with the officer of a corporation or person assuming to act in its behalf, he must under all circumstances take his chances on whether such officer or person has been specially authorized in regard to the matter, has no place in the law in our day. Proof of apparent authority of a corporate officer to contract in its behalf *prima facie* establishes actual authority so to do, and mere want of authority in fact will not relieve a corporation from the bur-



den of a contract made in reasonable reliance upon such appearance of authority. What will sufficiently evidence apparent authority of the president of a corporation to make a contract in its name must be considered with reference to the character of the business involved, common knowledge of the manner in which corporate business is usually carried on, and many other circumstances—significant among them the fact that it has come to pass that the president of a business corporation almost universally exercises the powers of a general agent for his company. One takes the obligation of a corporation, executed by its president in the regular course of business, not knowing any person in the transaction except such president, without a thought <sup>592</sup> of any necessity of making an inquiry as to whether he has been specially authorized in the matter or possesses power in the premises under any general law of the company. Presidents of corporations well-nigh universally exercise the power of a general agent, either by special or general authority regularly conferred, or by the tacit consent of the corporation, given by its governing board of directors, the public not knowing or stopping in business transactions to inquire how it was conferred. We are safe in saying that the circumstances where such is not the case are rare exceptions to the general course of corporate business. Such being the case, as a matter of common knowledge, if a corporation permits its president, for any considerable length of time, to so act, and its board of directors customarily omits to hold meetings for the purpose of directing the affairs of the corporation, apparently leaving its business affairs wholly to be looked after by its president, and specially, or by not acting affirmatively one way or the other, ratifies his acts, his authority to do the things which, by such conduct, he is apparently authorized to do is just as binding upon the corporation as if the power were conferred in the most formal manner.

Applying what has been said to the evidence in this case, it is far too strong in support of the findings of fact, that Bowen, as president of the Peerless Iron and Land Company, had apparent authority to extend respondent's time to cut and remove timber, to warrant us in saying that such findings are against the clear preponderance of the evidence. The evidence is substantially without dispute that the board of directors did not hold regular meetings for the purpose of directing the affairs of the corporation; that only two meetings were held from the time of the sale to respondent in 1893 till the exten-

sion was given in 1896. That strongly indicates that the whole business of the company was, by common consent, left with the president, as is often the case, particularly with small corporations. No special authority <sup>593</sup> was given to Bowen to make the sale in 1893, yet the sale was treated as valid, and without any knowledge coming to respondent of any action of the board of directors in the matter till long after the extension was granted. After such sale the business of the corporation was generally neglected by the board of directors. No provision was made even to pay its taxes. The lands were allowed to go to tax sale and tax deed, except in so far as respondent obligated himself, as part of the consideration for the timber, to pay the same. Bowen testified, in effect, that for years prior to the extension he was the only person that paid any particular attention to the corporate business; that he conducted it during such period substantially the same as if it were his own, reporting what he did to the members of the company whenever he could get them together, and otherwise to them in an individual way as he had opportunity to do so; and that his administration, at all times, appeared to meet with approval; that after the sale to respondent in 1893 and the appropriation of the money received thereon, partly to pay taxes upon the company's land and partly for division among its stockholders, he was unable to secure from the stockholders or directors any attention in particular to the company's business; that it did not thereafter receive any money, or pay out any money, or do any considerable amount of business, and none of consequence except what was done by himself. That is the effect of his evidence.

We will not further refer to the evidence in detail in an effort to carefully weigh it and demonstrate that it supports the findings complained of. It is sufficient to say that we are unable to discover that they are wrong under the rules governing the subject. There are many cases in the books where a corporation had been held estopped to deny that its president possessed the authority of a general agent, where the evidence on the subject was not nearly so strong as in <sup>594</sup> this case, as will be found by an examination of the cases to which we have referred. The custom being general, as we have said, for presidents of corporations, especially corporations having but little business to transact, to act in the capacity of general agents, to make contracts to buy and sell property and to generally do the corporate business, evidence

less strong is required to charge one with holding out its president as having such authority than is required to charge a natural person to the same effect.

It seems that the case is ruled by numerous decisions of this court we have cited, both as to the law and the facts. The gist of those decisions is that whenever the president of a corporation is found from day to day in general charge of the company's affairs it is conclusively presumed, as to innocent third persons, that he possesses all the powers ordinarily incident to the position of a general agent, and such other powers as he in fact has customarily exercised for such a period of time as to charge the governing board of the company with knowledge thereof, and which appearance of power they have taken no reasonable means to protect the public from being imposed upon by. The doctrine of estoppel stands guard, so to speak, over the application of the doctrine limiting the powers of the president of a corporation, preventing, where the latter doctrine would otherwise lead to, injustice. Both doctrines are given effect in the administration of the law for justice, but not to enable a corporation, or those operating in its shadow, to perpetrate a fraud.

In disposing of this case we give no significance to the circumstance that Bowen did not add the title of his office to the corporate signature he affixed to the extension. That was a mere oversight. That he executed the instrument as president of the corporation there is no question. Nor do we give any significance to the fact that the paper was not executed under the seal of the corporation or signed by its secretary. It was a mere waiver of the right to forfeit the ownership <sup>595</sup> of property, the title to which passed to respondent under the instrument of October 12, 1893. It was not a conveyance of real property. It was not a writing required by law to be executed under seal or to be signed by the secretary of the company. Therefore the absence of the corporate seal and the signature of the secretary from it is of no importance: *Ford v. Hill*, 92 Wis. 194, 53 Am. St. Rep. 902, 66 N. W. 115.

Neither do we give any significance to the fact, if it be a fact, that the sale of pine timber or the extension of time to cut timber from the lands was not by itself, strictly speaking, within the ordinary scope of the business of a general agent of the corporation. The payment of the taxes on the corporate property and obtaining the necessary money to that end was within such scope, and it abundantly appears that in

1893 the company had no other way of securing money for that purpose than by selling its pine timber; and in 1896, when the extension was given, it had no more appropriate way of providing for the payment of taxes upon its lands than by granting the extension as a condition thereof, as was done to the extent of one-half of such taxes. Moreover, if we were to hold that the giving of the extension in consideration of the payment of taxes was not within the scope of Bowen's authority as a general agent of the corporation, under the circumstances it would seem that the recognition of his authority to sell the timber by the formal act of the board of directors ratifying the sale, and the broad general grant of power given to him in addition to such ratification, to sell the timber on the land, included power to grant an extension of the right to remove timber sold and paid for, in consideration of the payment of taxes on the land, which payment was necessary to preserve to the company the timber not sold, and the land also, though in our general discussion of the case we have given controlling effect to the facts found by the court, that the corporation, by the manner in which it permitted its president to represent it, held him out as possessing authority to <sup>596</sup> sell its timber and to make such contracts in regard thereto as the one in question.

By the Court. The judgment is affirmed.

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*The President of a Corporation*, by virtue of his office merely, has very little authority to act for the company: *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799. He has no authority, as president, to act as its agent: *Wait v. Nashua Armory Assn.*, 66 N. H. 581, 49 Am. St. Rep. 630, 23 Atl. 77. But one dealing with him, in the usual course of business, and within the powers which he has been accustomed to exercise without objection from the directors, has the right to assume that he has been invested with such powers: *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799. His authority to act need not appear by the record or by any formal vote or resolution, but may be implied from acquiescence and from the nature and course of business transacted by the corporation: *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; *Swasey v. Emerson*, 168 Mass. 118, 60 Am. St. Rep. 368, 46 N. E. 426; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353. The president of a manufacturing corporation, who is in the active conduct and management of the business, must be presumed to have all the powers of any agent exercising like control and management, and to have authority to do what is usually and ordinarily done by such agents or managers: *Ceeder v. Loud etc. Lumber Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575.



*A Corporation is Bound by the Acts* of an officer, if it allows him to so conduct himself as to induce those dealing with him in good faith to believe he possesses certain powers, the same as though the authority were expressly granted: *Kocher v. Supreme Council*, 65 N. J. L. 649, 86 Am. St. Rep. 687, 48 Atl. 544; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

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### KELLER v. RUPPOLD.

[115 Wis. 636, 92 N. W. 364.]

**NOTE—Fraud in Obtaining Signature.**—A note to which the maker's signature has been procured by false representations as to the character of the paper, he being ignorant of its true character, and having no intention to sign such a paper, and being guilty of no negligence in doing so, is void, even in the hands of a bona fide holder. (p. 976.)

Action upon a promissory note. The jury returned a special verdict to the effect: (1) That the note mentioned in the complaint was signed by the defendant, and delivered to Flemming, the payee; (2) that the note was indorsed by Flemming, and the plaintiff is the owner thereof, and (3) the same is due and unpaid; (4) that the plaintiff became the lawful owner of the note before maturity, in due course of business, in good faith, and for a valuable consideration; (5) that the defendant was induced to sign the note in question by reason of false and fraudulent representations of the payee or his agents as to the character of the paper by him signed; (6) that at the time of the signing of the note the defendant did use ordinary care and caution to ascertain the exact nature of the paper by him signed at that time; (7) that they assessed the plaintiff's damages at one hundred and fifty-six dollars and eighteen cents. From the judgment entered upon such verdict in favor of the defendant, dismissing the action and for costs, the plaintiff appeals.

Joseph J. Lyon and Simon Gillen, for the appellant.

C. B. Sumner and Sanborn, Luse & Powell, for the respondent.

637 CASSODAY, C. J. The important question presented is whether such answers of the jury to the fifth and sixth questions of the special verdict are supported by the evidence.

The only witness as to the circumstances under which the note was signed and delivered is the defendant himself. According to the effect of his testimony, he and his wife were both illiterate—could read and write but very little English, and could not understand the meaning of reading and writing when shown to them; that September 12, 1898, a German <sup>638</sup> stranger came to his house, claiming that he had a new kind of lightning rod, and wanted to put the same on his house as a sample to advertise; that his father had left him sixty thousand dollars, and owned the company at Burlington, and could afford to put up such sample on small houses at a cost of only two dollars; that the defendant could earn the same a few days later by riding around with him, and speak a good word for the rods; that the defendant would have to sign a paper, so he would know upon what houses the rods had been put; that the stranger talked German nice, and he believed what he said; that he signed two papers or contracts—one for the stranger and the other for himself; that the stranger waved his hat, and the other fellows came from the road and put up the rod; that before signing the contract the stranger told him that he was to sign a policy, so that, if the house burned down, he would get one thousand dollars from the Burlington company; that the stranger showed him the paper and the policy; that, after putting up the rod, they called him up to the wagon, and said he was to sign the policy, and so he signed it; that he was going to call his neighbor, but they said it was not necessary; that they were in a hurry; that he did not know what was in the paper he signed; that they called it a policy and he believed what they told him—that the paper was a policy of insurance—and, relying upon that statement, he signed the paper; that they left a copy of the paper he signed as an insurance policy with him; that it turned out to be a copy of the note in question; that, after the stranger had left, the defendant showed what he up to that time had supposed to be an insurance policy to his neighbor, who told him that it was a note; that during the time the strangers were at the defendant's place there was not a word said by anyone about giving a promissory note, and no such word was mentioned.

The fraud practiced upon the defendant as to the character of the paper by him signed is undisputed. Flemming, the <sup>639</sup> payee of the note, and all of the three persons who co-operated in perpetrating the fraud, were conspicuously absent upon the trial. The plaintiff testified to the effect that he

lived at Sheboygan, and was a pawnbroker, engaged in making loans and buying notes, etc., and had been in such business for ten or twelve years; that he did not get the note of Flemming, the payee, but of H. Simpson, who lived at Burlington, and was in the wholesale and retail lightning-rod business, and that he paid him therefor one hundred and twenty-four dollars, December 7, 1898; that the note bore the indorsement of J. D. Flemming at the time he purchased the same, and that he did not know Flemming's business. The evidence is sufficient to sustain the answer of the jury to the sixth question submitted, and the undisputed evidence is sufficient to sustain the answer of the jury to the fifth question submitted. It follows that there was no error in refusing to set aside the answers to those questions; much less in refusing to order judgment in favor of the plaintiff.

The question recurs whether, under the findings of the jury and the undisputed evidence, the plaintiff is entitled to the protection of a bona fide holder of commercial paper for value and before maturity. Of course, there are numerous cases where such bona fide holder is entitled to such protection: 1 Daniel on Negotiable Instruments, sec. 848. "But," that learned author observes, "in all these cases the party intended to sign and put in circulation the instrument as a negotiable security. Where this is the case, he is bound to know that he is furnishing the means whereby third parties may be deceived, and innocently led to part with their property on the faith of his signature, and in ignorance of the true state of facts." Thus, in an English case, there cited, "the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guaranty. In an action against him as indorser at the suit of a bona fide holder for value, the jury were directed '10 that: 'If the defendant's signature to the document was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if he is not guilty of any negligence in so signing the paper, he was entitled to the verdict.' Held, a proper direction": *Foster v. Mackinnon*, L. R. 4 C. P. 704. This court has held that: "A note to which the maker's signature has been procured by false representations as to the character of the paper itself, he being ignorant of its true character and having no intention to sign such a paper, and being guilty of no

negligence in doing so, is void, even in the hands of a holder for value, before maturity, and without notice": Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548. To the same effect, Kellogg v. Steiner, 29 Wis. 626; Butler v. Carns, 37 Wis. 61; Dowagiac Mfg. Co. v. Shroeder, 108 Wis. 110, 84 N. W. 14; Whitney v. Snyder, 2 Lans. 477; First Nat. Bank v. Lierman, 5 Neb. 247; Puffer v. Smith, 57 Ill. 527; Vanbrunt v. Singley, 85 Ill. 281; Mitchell v. Tomlinson, 91 Ind. 167. The ruling of this court in Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548, is sanctioned by the textwriter mentioned: 1 Daniel on Negotiable Instruments, sec. 849. That ruling is applicable to the case at bar. This case is clearly distinguishable from the late case of Keller v. Schmidt, 104 Wis. 596, 80 N. W. 935. We must hold that the plaintiff in the case at bar is not entitled to such protection of a bona fide purchaser.

By the Court. The judgment of the circuit court is affirmed.

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*The Holding of the Principal Case* is supported by Willard v. Nelson, 35 Neb. 651, 53 N. W. 572; 37 Am. St. Rep. 455; but see the note thereto, and also the note to Bedell v. Herring, 11 Am. St. Rep. 309-326. Consult, also, the later cases of Lally v. Terrell, 95 Me. 553, 85 Am. St. Rep. 433, 50 Atl. 896; Manhattan Sav. Inst. v. New York Nat. Ex. Bank, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079.

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**2. CANCELLATION OF COUNTY WARRANTS.**—If an Adequate Legal Remedy exists, either affirmative or defensive, a suit cannot be maintained to cancel county warrants alleged to have been illegally issued. (Idaho) *County of Ada v. Bullen Bridge Co.*, 180.

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**1. RAILROADS—Round-trip Return Tickets—Rights Under.**—The purchaser of a round-trip return railroad ticket, good only on the day of its issuance, is entitled to return on the only train running that day, although it is not scheduled to stop at the station where the ticket is sold. His expulsion from such train is wrongful and he is entitled to recover punitive damages therefor. (Miss.) *Illinois Central R. R. Co. v. Harris*, 466.

**2. RAILROADS—Rights of Ticket Holder—Statements of Railroad Employees.**—Conversations between a railroad ticket agent, and the purchaser of a railroad ticket, or between a railroad flagman and such purchaser, cannot deprive the latter of his rights under the terms of the ticket. (Miss.) *Illinois Central R. R. Co. v. Harris*, 466.

**3. RAILWAY COMPANIES.**—Where There is no Lawful Contract of Passage, the only right which a person on a train can claim against a railway corporation is that it shall not willfully or wantonly injure him. (N. C.) *McNeill v. Durham etc. R. R. Co.*, 641.

**4. RAILWAY CORPORATION—Liability to One Riding on a Pass Prohibited by Statute.**—An editor of a newspaper riding on a free pass, the issuing of which is forbidden by statute, cannot recover of the railway corporation for injuries to him due to the negligence of its employes. He and the corporation are in *pari delicto*, and the courts will leave them to settle their own controversy over damages for the breach of a contract forbidden by law. (N. C.) *McNeill v. Durham etc. R. R. Co.*, 641.

**5. RAILROADS—Limitations on Tickets.**—A railroad passenger paying full fare for his ticket is not bound by limitations printed thereon, unless he has notice thereof and has assented thereto. (S. C.) *Norman v. Southern Ry.*, 809.

**6. RAILROADS—Expulsion of Passenger—Damages—Question for Jury.**—Whether the act of a conductor in ejecting a passenger from his train is such as to entitle him to punitive damages is a question for the jury under a complaint whose allegations are

appropriate to an action for such damages. (S. C.) *Norman v. Southern Ry.*, 809.

7. **A RAILROAD COMPANY is Liable for the Death of a Trespasser** on its train due to the reckless or wanton conduct of its employes, or gross negligence amounting to willfulness. (Ill.) *Illinois Central R. R. Co. v. Leimer*, 266.

8. **RAILROADS.—An Attempt to Step upon a Moving Train** in compliance with the advice or direction of the conductor cannot be declared, as a matter of law, to be negligence that will bar a recovery for injuries sustained, unless the danger is so open and obvious that only a reckless man would encounter it. (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

9. **RAILROADS.—Every Attempt to Board a Train in Motion** is not, per se, contributory negligence. Whether or not it is, is a question of fact to be determined in view of all the attendant and surrounding circumstances. (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

10. **RAILROADS.—It is Within the Scope of a Conductor's Duty** to advise and direct passengers in the matter of boarding trains and in getting off at stations to secure their baggage to be rechecked. (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

11. **RAILROADS—Boarding Train in Motion—Evidence.**—A conversation between the conductor and a passenger with reference to the course to be pursued by the latter in getting off the train at a station to have his baggage rechecked is admissible as evidence in an action for injuries sustained by him while trying to reboard the moving train. (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

12. **RAILROADS—Boarding Train in Motion.—Testimony** by one injured in attempting to board a moving train that he heard the words, "Hurry up! Get on there!" is admissible, although he is unable to say they were spoken by the conductor, if such fact is shown by other testimony. (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

13. **RAILROADS—Boarding Train in Motion on Conductor's Advice.**—The fact that a person injured in boarding a moving train acted upon the suggestion, advice, or direction of the conductor is competent as tending to prove that he exercised reasonable care. (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

14. **RAILROADS—Boarding Train in Motion.—A Special Interrogatory.** Did the plaintiff attempt to board the train of the defendant after it was in motion, and if so, was such attempt the cause of the injury to the plaintiff?" should be modified by inserting the word "proximate" before the word "cause." (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

### CASHIERS.

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### CERTIFICATES OF STOCK.

See Corporations.

### CHATTEL MORTGAGES.

1. **A CHATTEL MORTGAGE is Good Against the Mortgagor**, though not in the form, nor accompanied by the affidavit, required by the statute and not filed for record. (Utah) *Deseret Nat. Bank v. Kidman*, 856.

**2. CHATTEL MORTGAGES.**—The Acknowledgment and Affidavit Annexed to a Chattel Mortgage May be Read Together for the purpose of showing that the party signing the mortgage is the same person who acknowledged its execution. (Utah) Deseret Nat. Bank v. Kidman, 856.

**3. CHATTEL MORTGAGE**—Affidavit Omitting the Word “Defraud.”—Though the statute requires a mortgage to be accompanied by an affidavit that it is made in good faith and without any design to hinder, delay, or defraud creditors, an affidavit declaring that the mortgage is made in good faith to secure the amount and debt therein specified, and without any design to hinder or delay the creditors of the mortgagor is sufficient. (Utah) Deseret Nat. Bank v. Kidman, 856.

**4. CHATTEL MORTGAGES**—Priority.—If a purchase of chattels and the giving of a mortgage thereon for the purchase price are concurrent and constitute a single transaction, such mortgage takes precedence over a prior chattel mortgage covering the purchaser's after-acquired property. (Mich.) Hammel v. First Nat. Bank of Hancock, 431.

**5. CHATTEL MORTGAGES** — Foreclosure — Process.—The affidavit and notice for the foreclosure of a chattel mortgage required by statute is process, and protects the sheriff in the execution thereof, the same as he is protected under the service of execution upon a judgment. (Idaho) Blumaur-Frank Drug Co. v. Branstetter, 151.

**6. CHATTEL MORTGAGES**—Foreclosure—Duties and Liabilities of Officer.—Upon receipt of an affidavit and notice for the foreclosure of a chattel mortgage, the sheriff must proceed to execute such process by levying upon the property described therein, and after such levy and taking the property into his possession, he must give notice and sell it as directed by statute, although an attachment or execution of a judgment creditor is placed in his hands after such levy. He is not called upon to determine the validity of such chattel mortgage and such affidavit and notice, fair upon their face, is process sufficient to protect him under his levy. (Idaho) Blumaur-Frank Drug Co. v. Branstetter, 151.

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### COMMERCE.

**INTERSTATE COMMERCE**—**Inspection of Sheep**.—A statute making it unlawful to bring sheep into the state without having them inspected and dipped is repugnant to the commerce clause of the federal constitution. (Idaho) *State v. Duckworth*, 199.

### COMPOUND INTEREST.

See Usury.

### COMPOUNDING FELONY.

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### CONDITIONS.

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### CONFLICT OF LAWS.

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### CONSTITUTIONAL LAW.

**1. CONSTITUTION**—**Amendment of**.—The “Majority of the Electors” referred to in a constitution as requisite to the ratification of an amendment thereto, means the majority of the electors voting upon the question of amendment, and not a majority of all the electors of the state or of those voting at the election. (Idaho) *Green v. State Board of Canvassers*, 169.

**2. CONSTITUTIONAL LAW**—**Police Power**.—An act which the constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation, but for such prohibition. (Wis.) *State v. Froehlich*, 894.

**3. CONSTITUTIONAL LAW**.—Courts will not decide constitutional questions when they can perceive another ground upon which to properly rest their decision. (Ind.) *Hart v. Smith*, 280.

**4. CONSTITUTIONAL LAW**.—**The Presumptions are in Favor of the constitutionality of a statute**, and, unless the courts can clearly see that the legislature has erred, the act must stand. (Utah) *State v. Sopher*, 845.

**5. CONSTITUTIONAL LAW—Statute Void in Part.**—If an unconstitutional section in a statute is of such import that its elimination would cause a result not contemplated or desired by the legislature, the entire statute is unconstitutional. (Ill.) *Mathews v. People*, 241.

**5a. CONSTITUTIONAL LAW—Statutes Invalid in Part.**—If the purpose of a statute is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient valid portions remain to effect the object without such invalid portions, and if the valid and invalid portions are so mutually connected with and dependent on one another, as conditions, considerations, or compensations, as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not have passed the residue independently; the whole act must be declared void. (Idaho) *Ballentine v. Willey*, 17.

**6. CONSTITUTIONAL LAW—Severance of Statutes.**—Whenever the court finds on the face of a statute a number of different provisions, some constitutional and some not, it may sever them if they are not interdependent, striking out the unconstitutional provisions and allowing the valid ones to stand. This is what is meant by the severance of a statute; but whenever a court, in order to uphold the constitutionality of a statute, has to interpolate therein provisions not put there by the legislature, this is no case of severance nor a proper limitation of the provisions which are in the statute by judicial construction. Such action is nothing less than pure judicial legislation, and this cannot be defensible. (Miss.) *Ballard v. Mississippi Cotton Oil Co.*, 476.

**7. CONSTITUTIONAL LAW—Special Legislation.**—If a statute does not relate to persons or things as a class, but to particular persons or things of a class, it is a special as distinguished from a general law. (Ill.) *Mathews v. People*, 241.

**8. CONSTITUTIONAL LAW—Inspection of Sheep.**—A statute which requires that all sheep brought into the state shall be dipped, and if unsound, dipped twice, while sound sheep within the state, need not be dipped, and diseased sheep need only be quarantined and "spot or hand dressed," unjustly discriminates against outside sheep, and contravenes the provision of the federal constitution that the citizens of each shall be entitled to all the privileges of citizens of the several states. (Idaho) *State v. Duckworth*, 199.

**9. CONSTITUTIONAL LAW—Appropriation for Salaries.**—The section of the Illinois statute creating a free employment agency, which provides for the salaries of the officers and clerks of the institution, violates the constitutional provision that bills making appropriations for salaries shall contain no provision on any other subject. (Ill.) *Mathews v. People*, 241.

**10. CONSTITUTIONAL LAW—Apportionment Statutes.**—The legislature is prohibited from enacting an apportionment law which does not give to the people of one county substantially equal representation to that given each other county in the state, based either upon the entire or voting population or upon some other just and fair basis. (Idaho) *Ballentine v. Willey*, 17.

**11. CONSTITUTIONAL LAW—Apportionment Statute.**—A legislative apportionment act which fails to provide representation for two existing counties and provides representation for two counties having no existence is unconstitutional and void. (Idaho) *Ballentine v. Willey*, 17.

**12. CONSTITUTIONAL LAW—Apportionment Statutes.**—An apportionment law which seeks to give proper representation to every part of the state must necessarily be an entirety, the one part compensating the other, and the various parts thereof mutually dependent upon one another. Hence, if some of its provisions are void, the whole must fail, unless sufficient remains to carry into effect the object of the statute without the aid of the void parts. (Idaho) *Balentine v. Willey*, 17.

**13. CONSTITUTIONAL LAW—Employer's Liability Act—Special Legislation.**—A statute providing that every employé of any corporation shall have the same rights and remedies for an injury suffered by him from an act or omission of the corporation or its employés as are allowed by law to other persons not employés, where the injury results from the negligence of a superior agent or officer, or of a person having the right to direct or control the services of the person injured, and also when the injury results from the negligence of a fellow-servant, and that knowledge of defective appliances by the person injured shall constitute no defense and that the provisions of the statute shall not be waived by contract, is unconstitutional, because it imposes restrictions on all corporations without reference to any difference arising out of the nature of their business, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the laws. (Miss.) *Ballard v. Mississippi Cotton Oil Co.*, 476.

**14. CONSTITUTIONAL LAW.—An Employer Whose Workmen** have left him and gone on a strike is entitled to contract with other workmen to fill the places of those who have left. (Ill.) *Mathews v. People*, 241.

**15. CONSTITUTIONAL LAW—Labor.**—The Privilege of Contracting is both a liberty, and a property right. Liberty includes the right to make and enforce contracts, because such right is included in the right to acquire property. Labor is property. (Ill.) *Mathews v. People*, 241.

**16. CONSTITUTIONAL LAW.—A Statute Creating a Free Employment Agency**, which prohibits the furnishing of workmen or lists of workmen to employers whose men are out on a strike or are locked out, is unconstitutional. (Ill.) *Mathews v. People*, 241.

**17. CONSTITUTIONAL LAW—Class Legislation.**—A statute prohibiting the issuing by merchants of tokens otherwise than in lawful money, in payment for the assignment or transfer of wages earned or unearned by any employé or laborer in any coal mine, and making tokens issued in violation of such statute, in the hands of any owner, immediately due and payable in lawful money to the extent of the wages assigned, is unconstitutional as conferring on a class of citizens special privileges and immunities, and as being class legislation against another class of citizens. (Ind.) *Dixon v. Poe*, 309.

**18. SUNDAY LAWS.**—A law generally prohibiting the transaction of business on Sunday is constitutional. (Utah) *State v. Sopher*, 845.

**19. SUNDAY LAWS Exempting Certain Businesses.**—A statute prohibiting the keeping open on Sunday of any place of business for the purpose of transacting business therein but exempting from its operation hotels, boarding-houses, baths, restaurants, livery-stables, and retail drugstores, for the legitimate business of each, and such manufacturing establishments as are usually kept in constant operation, is constitutional, and under it a barber may be convicted of keeping his shop open for business on Sunday. (Utah) *State v. Sopher*, 845.

**20. SUNDAY LAWS—Acts of Necessity.—The Keeping Open of a Barber-shop on Sunday** and the shaving of a customer therein are not acts of necessity and hence may be prohibited by statute. (Utah) *State v. Sopher*, 845.

**21. SUNDAY LAWS—Arbitrary Classification.—**The fact that a Sunday law exempts from its provisions hotels, boarding-houses, baths, restaurants, livery-stables, retail drugstores, and such manufacturing establishments as are usually kept in constant operation, does not show that an arbitrary classification has been adopted. (Utah) *State v. Sopher*, 845.

**22. CONSTITUTIONAL LAW —Log Liens—Purchaser's Liability.** A statute declaring that any person who buys an interest in property upon which a log lien is claimed, and uses or so disposes of the property that the lien cannot be enforced, renders himself liable for the entire debt due the lien claimant, is unconstitutional. (Wis.) *Rogers-Ruger Co. v. Murray*, 901.

**23. CONSTITUTIONAL LAW—Impairment of Obligation.—**An act which in any degree, no matter how slightly, modifies the obligation of a contract, by attempting to relieve one party from any duty by the contract assumed, is repugnant to the constitutional prohibition against the impairment of the obligation of contracts. (Wis.) *Oshkosh Waterworks Co. v. City of Oshkosh*, 870.

**24. CONSTITUTIONAL LAW—Impairment of Obligation.—**If neither party is relieved from performing anything of that which he obliged himself to do, the obligations of the contract are not impaired; but, if he is absolved from performing any of those things, such obligations are impaired, whether the absolution is accomplished directly and expressly, or indirectly and only as a result of some modifications of the legal proceedings for enforcement. (Wis.) *Oshkosh Waterworks Co. v. City of Oshkosh*, 870.

**25. CONSTITUTIONAL LAW—Impairment of Obligation.—**A variance of policy as to liberality of amendment in judicial proceeding cannot be said to impair the obligation of contracts. (Wis.) *Oshkosh Waterworks Co. v. City of Oshkosh*, 870.

**27. CONSTITUTIONAL LAW—Impairment of Obligations.—**The requirement of certain new steps for the enforcement of a demand, incidentally resulting in a reasonable delay, does not work an impairment of the obligation of contracts. (Wis.) *Oshkosh Waterworks Co. v. City of Oshkosh*, 870.

**28. CONSTITUTIONAL LAW.—**It is not an Impairment of the Obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties. (Wis.) *Oshkosh Waterworks Co. v. City of Oshkosh*, 870.

**29. CONSTITUTIONAL LAW—Impairment of Obligation—Procedure for Presenting Claims Against City.—**The obligation of contracts with a city is not impaired by an amendment to its charter providing that no action upon a claim against it shall be maintained until it has been presented to the city council for allowance and disallowed in whole or in part, either by affirmative action or by failure to pass upon it for sixty days; and that a disallowance shall be final and conclusive and a bar to any action, unless within twenty days an appeal to the circuit court is taken, with a bond for costs to be approved by the city attorney and city comptroller. (Wis.) *Oshkosh Waterworks Co. v. City of Oshkosh*, 870.

**30. CONSTITUTIONAL LAW.—**Internal Improvements as the words are used in a constitutional provision against the state  
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being a party thereto, include those things which might be expected to be undertaken for profit or benefit to the property interests of the private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government. (Wis.) *State v. Froehlich*, 894.

31. **CONSTITUTIONAL LAW—Internal Improvements.**—Levees or Dikes to restrain the waters of a navigable river are, *prima facie*, works of internal improvement, within the meaning of a constitutional prohibition against the state being a party to such improvements, whether the main purpose be promotion of navigability, creation of water power, or reclamation of lands. (Wis.) *State v. Froehlich*, 894.

32. **CONSTITUTIONAL LAW—Internal Improvements.**—The Fact that Levees to restrain the waters of a river might incidentally avert possible peril to life cannot make them other than works of internal improvement to which the state by a constitutional provision is prohibited from being a party. (Wis.) *State v. Froehlich*, 894.

33. **CONSTITUTIONAL LAW—Vested Right to Remedy.**—Over mere remedial procedure the power of the legislature is absolute, and laws regulating it involve so much of the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein. (Wis.) *Oshkosh Waterworks Co. v. City of Oshkosh*, 870.

34. **VESTED RIGHTS.**—Failure to Exercise vested rights before the enactment of a subsequent statute which seeks to divest them, in no way affects or lessens such rights. (Mo.) *Gladney v. Sydnor*, 517.

35. **VESTED RIGHTS—Retrospective Laws.**—A law which, even if intended simply to change the remedy or procedure, is void if in fact it impairs vested rights. (Mo.) *Gladney v. Sydnor*, 517.

36. **VESTED RIGHTS** may be Created either by the common law, by statute, or by contract. No matter how created, they are entitled to the same protection. (Mo.) *Gladney v. Sydnor*, 517.

37. **RETROSPECTIVE AND EX POST FACTO LAWS.**—Retrospective laws relate to civil rights and civil proceedings, while *ex post facto* laws have special application to criminal cases. (Mo.) *Gladney v. Sydnor*, 517.

38. **RETROSPECTIVE LAWS—Vested Rights.**—Laws are not to be deemed retrospective, unless they impair civil rights which are vested. (Mo.) *Gladney v. Sydnor*, 517.

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#### CONTRACTS.

1. **CONTRACT**, When Valid, Though Prohibited by Statute.—An act prohibited under a penalty imposed by statute, the prohibition

being for the protection of the public revenue, and the act being neither malum in se nor malum prohibitum, is not void. (Idaho) Vermont Loan etc. Co. v. Hoffman, 186.

**2. CONTRACT Between City and Water Company—Damages to Individual—Privity of Contract.**—Under a contract between a city and a water company by which the latter agrees to furnish the former water sufficient for fire purposes, a private citizen cannot maintain an action against such water company for injury to, or destruction of, his property caused by the failure of such company to fulfill its contract with the city. There is no privity of contract between such citizen and such water company. (Idaho) Bush v. Artesian Hot etc. Water Co., 161.

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### CORONER'S INQUEST.

1. **CORONER'S INQUEST**—Admissibility of as Evidence.—In England coroners' postmortems are admissible as evidence of the status, but are not conclusive, and the like rule prevails in some of the United States. (Or.) *Cox v. Royal Tribe*, 752.

2. **CORONER'S INQUEST** as Evidence of Suicide.—The verdict of a coroner's jury is not admissible in Oregon to prove that the decedent came to his death by suicide. (Or.) *Cox v. Royal Tribe*, 752.

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**CORPORATIONS.**

1. **CORPORATIONS—Estoppel.**—An Artificial Person is estopped from denying that its agents possess all the authority which it gives them the appearance of having the same as a natural person. (Wis.) *St. Clair v. Rutledge*, 964.

2. **CORPORATIONS.**—The Doctrine of Estoppel stands guard over the application of the doctrine limiting the powers of the president of a corporation, preventing, where the latter doctrine would otherwise lead to, injustice. (Wis.) *St. Clair v. Rutledge*, 964.

3. **CORPORATIONS—President's Signature.**—When the president of a corporation signs a writing with the name of the corporation by himself, the inadvertent omission of his title of office does not affect the validity of the instrument. (Wis.) *St. Clair v. Rutledge*, 964.

4. **CORPORATIONS.**—The Written Evidence of a Corporate Contract need not be sealed with the corporate seal or signed by the secretary of the corporation to give it validity, unless it is one required by statute to be so sealed and signed. (Wis.) *St. Clair v. Rutledge*, 964.

5. **CORPORATIONS—Seal.**—The Waiver of the Right to forfeit to a corporation the title to real property is not a conveyance, and is not required to be executed under seal or signed by the secretary of the company. (Wis.) *St. Clair v. Rutledge*, 964.

6. **CORPORATION—Resignation of Officers of, for the Purpose of Causing the Appointment of a Receiver.**—Though the code provides that a receiver of the property of a corporation may be appointed in an action "brought by the attorney general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same," resignations made for the purpose of enabling such an action to be brought, and a receiver to be appointed, are ineffective. (N. Y.) *Zeltner v. Zeltner Brewing Co.*, 574.

7. **CORPORATIONS.**—The President of a Corporation does not, by virtue of his office, possess authority to bind the company by contract. (Wis.) *St. Clair v. Rutledge*, 964.

8. **CORPORATIONS—Authority of President.**—A Person Who Contracts with the president of a corporation pretending to act in its behalf is bound to know the extent of his powers; but this rule must be considered with reference to countervailing rules rendering it dormant when otherwise injustice would be done. (Wis.) *St. Clair v. Rutledge*, 964.

9. **CORPORATIONS—Authority of President.**—A Corporation is Estopped from denying in any particular instance that its president has the power which it customarily has allowed him to exercise in the face of the public. (Wis.) *St. Clair v. Rutledge*, 964.

10. **CORPORATIONS—Authority of Officer.**—Proof of Apparent authority of a corporate officer to contract in its behalf *prima facie* establishes actual authority so to do, and mere want of authority in fact will not relieve a corporation from the burden of a contract made in reasonable reliance upon such appearance of authority. (Wis.) *St. Clair v. Rutledge*, 964.

11. **CORPORATIONS—Authority of President.**—What Will Evidence authority of the president of a corporation to bind it by contract must be considered with reference to the circumstance that



such officer almost universally exercises the power of a general agent for his company. (Wis.) *St. Clair v. Rutledge*, 964.

**12. CORPORATIONS—Authority of President.**—If the directors of a corporation for a long time fail to exercise their functions in directing corporate affairs, and leave them wholly to be looked after by the president, his authority to do the things he is apparently authorized to do is as binding upon the corporation as though conferred in the most formal manner. (Wis.) *St. Clair v. Rutledge*, 964.

**13. CORPORATIONS—President as General Agent.**—The custom being general for presidents of corporations to act as general agents, to make contracts, to buy and sell property, and to generally do corporate business, evidence less strong is required to charge one holding out its president as having such authority than is required to charge a natural person to the same effect. (Wis.) *St. Clair v. Rutledge*, 964.

**14. CORPORATIONS—Authority of President.**—When the president of a corporation is found from day to day in general charge of the company's affairs, it is conclusively presumed, as to innocent third persons, that he possesses all the powers of a general agent, and such other powers as he in fact has exercised for such a time as to charge the governing board of the company with notice thereof, and which appearance of power they have taken no means to protect the public from being imposed upon by. (Wis.) *St. Clair v. Rutledge*, 964.

**15. A CORPORATION IS ANSWERABLE for the Acts and Neglects of Its Agents** while engaged in the business of the agency to the same extent and under the same circumstances that a natural person is charged with the acts and neglects of his agents. (N. C.) *Havens v. Bank of Tarboro*, 627.

**16. CORPORATIONS—Liability of for Stock Certificate Issued Without Authority.**—If the president of a banking corporation signs blank certificates of stock and leaves them with the cashier to be filled out in the name of the purchasers when called for, and the cashier issues a certificate to himself, using a blank so signed, and borrows money thereon of a person innocent of his fraud, the corporation is liable to the lender for the value of such stock not exceeding the amount of the debt secured thereby. (N. C.) *Havens v. Bank of Tarboro*, 627.

**17. CORPORATION—Stock—Notice, When not Imported by Certificate.**—The fact that a certificate of stock recites that it is transferable only on the stock-book of the corporation does not charge one who loans money on it as collateral security with notice of any defect in the title of the borrower, who is named in such certificate as the holder of the stock therein specified. (N. C.) *Havens v. Bank of Tarboro*, 627.

**18. CORPORATE STOCK—Bona Fide Purchaser of, Who is.**—One is not deprived of his character of bona fide purchaser of stock in a corporation by the fact that the certificate is not surrendered and the transfer noted on the books of the corporation, though such certificate declares that it is transferable only on the books of the corporation. (N. C.) *Havens v. Bank of Tarboro*, 627.

**19. CORPORATIONS—Liability of Stockholders.**—The stockholders in a corporation are liable to its creditors to an amount equal to the unpaid balance due on the nominally paid up certificates of stock issued to them. (Mo.) *Shields v. Hobart*, 529.

**20. CORPORATIONS—Liability of Stockholders—Fraud.**—It is not necessary to charge fraud to subject a stockholder's unpaid liability to a creditor's judgment against the corporation. (Mo.) *Shields v. Hobart*, 529.

**21. CORPORATIONS—Right to Prefer Creditors.**—A corporation while a going concern may prefer one creditor to another. (Mo.) *Shields v. Hobart*, 529.

**22. CORPORATIONS—Preferences—Private Debts of Officers.**—If a corporation has reached a point where its assets are insufficient to satisfy its corporate debts, its managing officers cannot pay their private debts from the assets of the corporation as against the claims of its existing creditors who complain. Such transaction is *prima facie* fraudulent. (Mo.) *Shields v. Hobart*, 529.

**23. CORPORATIONS—Dividends can be Paid Only** out of profits or the net increase of the capital of a corporation and cannot be drawn upon the capital contributed by the shareholders for the purpose of carrying on the company's business. (Mo.) *Shields v. Hobart*, 529.

**24. CORPORATIONS—Dividends.**—Neither the directors of a corporation, nor even a majority of its stockholders, have any authority to diminish its prescribed capital by distributing a portion among the shareholders in the shape of dividends. This would be a fraud upon creditors contracting with it on the faith of its capital stock. (Mo.) *Shields v. Hobart*, 529.

**25. CORPORATIONS—Unlawful Dividends.**—Shareholders in a corporation are not permitted to distribute its capital among themselves under the guise of dividends when they are indebted to the corporation on their unpaid liability on the stock subscription. (Mo.) *Shields v. Hobart*, 529.

**26. CORPORATIONS—Unlawful Dividends—Setoff.**—If the notes of a corporation which its officers as indorsers have paid were the result of a fraudulent reduction and distribution of the capital stock of the corporation under the guise of dividends, the court will not in an equitable suit by a judgment creditor of the corporation against its stockholders to subject to his debt the unpaid balance of paid-up stock issued to them, set off the amount thus paid on such notes against the balance remaining unpaid on the stock of the officers paying them. Such preference given to the officers themselves is *prima facie* fraudulent, and the burden rests on them to show that such notes were honest obligations of the corporation. The mere production of the notes executed, indorsed and paid by themselves, falls far short of that proof which a court of equity requires to overcome the presumption of fraud. (Mo.) *Shields v. Hobart*, 529.

**27. CORPORATIONS—Conversion of Stock—Presumption.**—If a large part of the capital stock of a corporation is shown to have been illegally converted by its managing officers, it must be presumed, in the absence of a full explanation by them, that the whole of stock has been, by them, fraudulently converted. (Mo.) *Shields v. Hobart*, 529.

**28. CORPORATIONS—Stock—Validity of Transfer.**—A stockholder in a corporation may obtain control of a majority of the stock therein by purchase, and the validity of the transfer does not depend on the motive of the purchaser or his purpose in acquiring it. (Mich.) *Jones v. Green*, 433.

**29. CORPORATIONS—Stock—Voting Power.**—Corporate stock standing in the name of an administrator may be voted by him, in

electing directors, as against those holding a beneficiary interest therein. (Mich.) *Jones v. Green*, 433.

**30. CORPORATIONS—Contracts with Stockholders—Fraud.**—A contract between a corporation and a stockholder therein, entered into through directors to whom he has assigned stock in order to make them eligible as directors, is in effect a contract by the stockholder with himself, and if made for the purpose of producing a profit for him, is a fraud upon the corporation and void. (Mich.) *Jones v. Green*, 433.

**31. CORPORATIONS — Contracts with Stockholders — Setting Aside—Return of Benefits.**—If the directors of a corporation, with the concurrence of a majority of its stockholders, agree that one stockholder shall expend a certain sum of money in the development of the corporate property, and in return therefor shall receive a certain amount of stock, and such contract is declared void and the transfer of stock is set aside, equity requires that such stockholder shall be reimbursed for all money expended by him bona fide under the contract, but his lien for money thus expended by him should be limited to the stock delivered to him, and he is not entitled to a lien on the corporate property itself for such expenditures. (Mich.) *Jones v. Green*, 433.

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See Tenancy in Common.

## COUNTIES.

**1. A COUNTY** is not **Liable for a Tort**, unless expressly made so by statute. (Idaho) *Davis v. Ada Co.*, 166.

2. **COUNTY—Negligent Construction of Bridge.**—A county is not liable for negligence in the construction and maintenance of bridges, unless made so by statute. (Idaho) *Davis v. Ada Co.*, 166.

3. **PUBLIC OFFICERS—Individual Liability for Negligence.**—County commissioners are not individually liable in damages for injury caused by defective public highways or bridges. (Idaho) *Worden v. Witt*, 70.

4. **COMPELLING CLAIMS to be Waged.**—A County may compel the holders of alleged illegal warrants to wage their claims thereon, or forever abandon them. (Idaho) *County of Ada v. Bullen Bridge Co.*, 180.

See Constitutional Law, 10-13.

Note.

County Clerks. See Clerks of Court.

## COUNTY WARRANTS.

See Cancellation of Instruments.

## COVENANTS.

1. **A COVENANT OF WARRANTY Does not Pass to the Grantee of the Grantee** without an express assignment, where the conveyance in which it is contained is as such void. (N. C.) *Smith v. Ingram*, 680.

2. **CONFLICT OF LAWS—Covenant of Warranty, Difference Between Asserting as an Estoppel and a Cause of Action.**—Where it is claimed that a covenant of warranty operates as an estoppel affecting the title to land, it must be governed by the law of the state wherein the land is situated, and if not valid by the law of that state cannot be enforced as an estoppel. (N. C.) *Smith v. Ingram*, 680.

See Husband and Wife, 3.

## CRIMINAL LAW.

1. **CRIMINAL TRIALS—Right of Accused to be Present.**—If, on a murder trial, a witness for the prosecution is partially examined in the absence of the accused, when all proceedings are stopped, the presence of the accused procured, the evidence taken in his absence excluded and the jury instructed to wholly disregard it, whereupon, against the objections and exception of the accused, the witness is re-examined, testifying substantially as he had done in the absence of the accused, the action of the court is fatally erroneous, and the accused, upon conviction, is entitled to a new trial. (Miss.) *Booker v. State*, 474.

2. **JURISDICTION—Excessive Sentence.**—If a court having jurisdiction of the person of a prisoner, and jurisdiction to try and sentence him for the crime charged, on conviction sentences him to a longer term of imprisonment than the statute authorizes, such judgment or sentence is absolutely void. (Idaho) *Ex parte Cox*, 29.

3. **JURISDICTION to Impose the Sentence Pronounced in a particular case is as essential to the validity of the judgment as is the jurisdiction of the person or the subject matter.** (Idaho) *Ex parte Cox*, 29.

4. **CRIMINAL LAW—Discretion of Court.**—The Rendering of Judgment and final sentence cannot be made a mere matter of dis-



cretion with the judge or the public prosecutor, nor to depend upon the subsequent conduct of the convicted person. (Ill.) *People v. Barrett*, 230.

5. **CRIMINAL LAW—Release on Parole.**—Trial courts cannot suspend indefinitely the sentence of one convicted of crime, and permit him to go at large upon his own recognizance or upon parole. (Ill.) *People v. Barrett*, 230.

6. **CRIMINAL LAW—Suspending Sentence.**—A court may delay pronouncing judgment in a criminal case for a reasonable time to hear and determine motions for a new trial or in arrest of judgment, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes; but it cannot suspend indefinitely the pronouncing of sentence or the execution of judgment. (Ill.) *People v. Barrett*, 230.

7. **CRIMINAL LAW—Delay in Sentence.**—An unexplained delay intervening between the release of a person convicted of crime on his own recognizance while his motion for a new trial is pending, and the final disposition of that motion and his remandment to custody, deprives the court of jurisdiction to pronounce sentence. That the delay was with his consent is immaterial. (Ill.) *People v. Barrett*, 230.

8. **CRIMINAL LAW—Indefinite Suspension of Sentence.**—If a court, when a defendant appears before it for sentence, enters an order declaring that the sentence be, and the same is, hereby, suspended, and the defendant permitted to go upon his own recognizance, it loses jurisdiction over him, and all subsequent proceedings by it are unauthorized and void. (Utah) *In re Flint*, 853.

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## DAMAGES.

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## DANGEROUS PREMISES.

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## DEATH.

**DEATH.**—**Nonresident Alien Relatives** of a deceased are not entitled to the benefits of the Wisconsin statute giving a right of action for wrongful death. (Wis.) *McMillan v. Spider Lake etc. Co.*, 947.

## DEEDS.

1. **DEEDS.**—**Conditions and Restrictions** inserted in a deed will be upheld, so long as the beneficial enjoyment of the estate is not materially impaired and the public good not violated. (Ill.) *Wakefield v. Van Tassell*, 207.

2. **DEEDS**—**Conditions Against Public Policy.**—If conditions in a deed are made in good faith, and nothing *malum in se* or *malum*

prohibitum is stipulated for, they will not be held to contravene public policy, unless the advantage to the public from so holding is certain and substantial. (Ill.) *Wakefield v. Van Tassell*, 207.

3. **DEEDS.—A Condition in a Deed that no Grain Elevator** shall ever be built on the four village lots conveyed, or grain ever handled thereon, is valid and enforceable, notwithstanding the building erected is a public warehouse, there being no such warehouse on the premises when conveyed and the condition not affecting all available lands in the community. (Ill.) *Wakefield v. Van Tassell*, 207.

4. **DEEDS—Perpetuities.—A Condition in a deed that no grain elevator shall ever be built on the premises, or grain ever handled thereon, does not violate the rule against perpetuities.** (Ill.) *Wakefield v. Van Tassell*, 207.

5. **CONFLICT OF LAWS.—The Transfer of Realty** is governed by the laws of the state where it is situated. (N. C.) *Smith v. Ingram*, 680.

See Acknowledgment; Covenants; Husband and Wife; Vendor and Vendee.  
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**Definition of ademption of legacies, 343.**

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## DEVISE.

See Wills.

## DIVIDENDS.

See Corporations, 23-26.

## DIVORCE.

1. **DIVORCE, Collusive and Fraudulent, When Will not be Relieved Against.**—When a divorce is obtained by collusion of the parties, or by the suppression of facts or false testimony, it will not be disturbed at the instance of one of the parties who are in pari delicto, especially when one of them has subsequently married. This rule applied where the consent of a wife to a divorce was secured by her husband's representing to her that its purpose was to obtain a conveyance from his father of land occupied by them as their homestead, and that he would afterward remarry her. (Utah) *Karren v. Karren*, 815.

2. **DIVORCE—Subsequent Changes in Respecting Children or the Disposition of Property.**—Under the statute of Utah, providing that subsequent changes may be made in a decree of divorce by a court in respect to the disposal of the children or the disposition of property, no such change can be made by an independent suit seeking relief, but must be applied for in the original section. (Utah) *Karren v. Karren*, 815.

3. **A MORMON DIVORCE**, by which the parties to the marriage, with the consent of the church, agree to dissolve their marital relations is invalid, and so remains, though the parties to the marriage believe the divorce to be valid, and one of them subsequently be-

comes a party to another marriage ceremony. (Utah) *Hilton v. Roylance*, 821.

### **EASEMENTS.**

1. **EASEMENTS—Private Ways—Right to Widen.**—If a person has selected, accepted and used for a long number of years a private way of a certain width over a particular part of the lands of the person holding the servient estate, the former has no right to change it by widening it, on the ground that it has become wet and inconvenient, but he must be confined to the way thus selected. (Ind.) *Dudgeon v. Bronson*, 315.

2. **EASEMENTS—Private Ways—Right to Change.**—If a private way has been once selected, it cannot be changed in any manner by either party without the consent of the other. (Ind.) *Dudgeon v. Bronson*, 315.

See Ways.

### **EJECTMENT.**

**EJECTMENT.**—An Estoppel in Pais cannot be invoked in ejectment to defeat the legal title. (Ill.) *Wakefield v. Van Tassell*, 207.

### **ELECTIONS.**

See Constitutional Law, 1.

### **ELECTRIC COMPANY.**

See Negligence, 2.

### **EMPLOYER'S LIABILITY ACT.**

See Constitutional Law, 13-17.

### **EMPLOYMENT AGENCY.**

See Constitutional Law, 16; Licenses, 1.

### **EQUITY.**

1. **EQUITY—Resort to Where There is a Remedy at Law.**—A suit in equity cannot be maintained where there is a plain, speedy, and adequate remedy at law, though the same judge presides over the courts of law and of equity. (Or.) *Abernethy v. Orton*, 774.

2. **EQUITY JURISDICTION—Consolidation of Suits.**—If several plaintiffs have separately sued the same defendant in actions at law for a continuing trespass, and his liability in each action, depends upon the same facts, equity has jurisdiction to enjoin the multiplicity of suits and have them consolidated in the same action. (Miss.) *Illinois Central R. R. Co. v. Garrison*, 469.

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**ESTATE OF DECEDENT.**

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**ESTOPPEL.**

See Corporations, 1, 2; Husband and Wife, 4, 5; Limitation of Actions, 3.

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**Estoppel.** See Statute of Limitations.

**EVIDENCE.**

1. **EVIDENCE—Judicial Notice of Creeds.**—The courts will take judicial notice of the creeds and general doctrine of the Mormon Church and of the principles of celestial marriage peculiar to that church. (Utah) *Hilton v. Roylance*, 821.

2. **EVIDENCE—History and Records.**—When the evidence of the meaning of the term “sealed,” or “sealing ordinance,” is unsatisfactory, the works of history and church records and journals of the Mormon Church are admissible as evidence. (Utah) *Hilton v. Roylance*, 821.

3. **EVIDENCE.—The Admissions of an Agent are not Competent as Evidence** against his principal, unless they are expressly authorized, or relate to, and are connected with, some act done in the course of his agency. (N. Y.) *Taylor v. Commercial Bank*, 564.

4. **EVIDENCE—Res Gestae—Declarations.**—Time is not necessarily a controlling element or principle in the matter of *res gestae*, and declarations made under circumstances to warrant the court in presuming that they grew out of the litigated issue and illustrate the true character of the transaction, and were dependent upon it, were not designedly made or devised, for a self-serving purpose, are evidentiary facts, and not within the rule applicable to hearsay evidence. Such declarations are admissible, although not made at the exact time of the occurrence of the principal fact in issue. (Idaho) *Coffin v. Bradbury*, 37.

5. **EVIDENCE.—Statements and Admissions Made by a Party to the Suit**, may be proved without first calling his attention to them, or laying any foundation for impeachment. (Idaho) *Coffin v. Bradbury*, 37.

6. **EVIDENCE, Parol, When Admissible.—To Authorize the Admission of Parol Evidence to Complete an Agreement**, it is essential that the writing appear upon inspection, to be an incomplete contract, and that such evidence be consistent with, and not contradictory to it. (N. Y.) *Brantingham v. Huff*, 545.

7. **EVIDENCE.—To Explain Writing.**—If a writing is introduced in evidence as an admission, and not as part of the contract between the parties, it is always admissible for the person who wrote it, and against whom it is introduced, to explain the meaning he intended to convey. (Idaho) *Coffin v. Bradbury*, 37.

See Adoption; Coroner's Inquest; Mortgages, 5.

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**EXCEPTIONS.**

See Appeal and Error.

**EXCHANGES.**

See Property; Taxation, 1.

**EXECUTIONS.****EXECUTION—Mortgaged Chattels, When not Subject to.—**

Mortgaged personal property is not subject to levy under execution against the mortgagor, if it has been surrendered by him to the mortgagee to be sold in satisfaction of the debt. (Ky.) Newman v. Mantle, 372.

See Exemptions; Vendor and Vendee, 1.

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**EXECUTORS AND ADMINISTRATORS.**

1. **EXECUTORS—Debts Due from.**—At the common law the appointment by a testator of his debtor as executor operated as a release of the debt, except as to creditors. (Or.) Mason's Estate, 734.

2. **EXECUTORS and Their Sureties, When Answerable for Debts Due to Decedent.**—An executor, though insolvent, must account for a debt due from him to his testator under a statute declaring that the naming of anyone as executor in a will shall not operate to discharge him from any claim which the testator had against him, but the claim shall be included in the inventory, and if the person so named afterward takes upon himself the administration of the estate, he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable, and he must, in the final settlement of his accounts, be discharged therewith as for money in his hands. (Or.) Mason's Estate, 734.

3. **EXECUTORS, Liability of—Statute, When Does not Limit.**—The provisions of a statute declaring that an executor is chargeable with all property of the estate that may come into his possession at the value of the appraisement contained in the inventory, and shall not be accountable for the debts of the estate if it appear that they remain uncollected without his fault, does not relieve him from liability for debts due from him to the decedent, though he is insolvent. (Or.) Mason's Estate, 734.

4. **ESTATE OF DECEDENT—Res Judicata.**—An Order Directing the Sale of Real Property of a decedent to pay specified debts

is not conclusive of the existence and validity of those debts in favor of the administrator in a subsequent proceeding between him and the distributees of the estate for the settlement of his accounts. (N. C.) *Austin v. Austin*, 637.

See Vendor and Vendee, 1.

### EXEMPTIONS.

**EXEMPTION OF TEAM**—Drayman not yet in Business.—If a person purchases a team with the bona fide intention of engaging in the business of a teamster or drayman, the horses are exempt from levy, although he has not yet actually entered upon such business. (Idaho) *Cleveland v. Andrews*, 165.

See Public Lands.

### EX POST FACTO LAWS.

See Constitutional Law, 37.

### FELLOW-SERVANTS.

See Constitutional Law, 13; Railroads.

### FIRE.

See Contracts, 2.

### FIREARMS.

See Negligence, 1.

### FORECLOSURE.

See Chattel Mortgages; Mortgages.

### FRAUD.

**REPRESENTATIONS** as to a Fact to Occur in the Future. — A statement that a party will get his pay if he makes a loan to a third person, is not a statement of an existing fact, but, at most, of something in the future, and hence not actionable, though it turns out to be untrue, unless the statement was made with knowledge of its falseness, and was not a mere expression of opinion. (N. Y.) *Taylor v. Commercial Bank*, 564.

See Bills and Notes; Marriage, 12.

### FRAUDS, STATUTE OF.

See Evidence, 6, 7; Sales; Trusts, 1-3.

### FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCE**—Homestead.—If land is exempt as a homestead, its conveyance cannot be in fraud of creditors. (Ky.) *Morrow v. Bailey*, 382.

2. **FRAUDULENT CONVEYANCES**—Pleading.—A complaint to set aside a fraudulent conveyance, containing no averment as to the

financial condition of the defendant at the time of the commencement of the action, except that he had no property subject to execution of which plaintiff has any knowledge, is wholly insufficient. (Ind.) *Davis v. Chase*, 294.

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### GAMBLING.

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See Landlord and Tenant.

### GIFTS.

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### GOODWILL.

**"GOODWILL"** of Business is not of Itself Property.—It is an incident that may attach to, or in some cases be connected with, property. (Ind.) *Hart v. Smith*, 280.

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### HABEAS CORPUS.

1. **HABEAS CORPUS—Excessive Sentence.**—If a court does not have authority to render a particular sentence, if such sentence is different from that prescribed by statute, or is below the minimum or above the maximum, it is void and good ground for the release of the prisoner on habeas corpus. (Idaho) *Ex parte Cox*, 29.

2. **HABEAS CORPUS—Excessive Sentence.**—If a prisoner is held under a void and excessive sentence, and the matter is properly brought to the attention of the appellate court, it has authority to inquire into the matter, and to discharge him on habeas corpus. (Idaho) *Ex parte Cox*, 29.

### HIGHWAYS.

See Counties.

### HOMESTEADS.

1. **HOMESTEAD, When not Liable for Pre-existing Debts.**—A homestead cannot be made liable for the debts of the owner on the ground that it was not paid for until after such debts were contracted, if the payment for it was made by selling off parts, and it is the residue only which it is sought to be subjected to execution. (Ky.) *Morrow v. Bailey*, 382.

2. **HOMESTEAD Acquired with Check for Pension Moneys.**—A homestead acquired in exchange for a check issued for pension moneys exempt from execution is, nevertheless, subject to execution on a debt created previously to the purchase of such homestead. (Ky.) *Curtis v. Helton*, 388.

**3. HOMESTEADS—Vested Rights—Retrospective Laws.**—A husband who acquires a homestead under a statute allowing him to sell or encumber it, subject to the wife's inchoate right of dower, without her joining him, except when she has filed her homestead claim, has a vested right to sell or encumber such homestead, subject to such limitations, and this right cannot be taken from him by a statute subsequently enacted which debars him from selling or in any manner encumbering the homestead. Such statute can operate only prospectively and cannot be applied to husbands who have acquired a homestead prior to its enactment. As to them it is retrospective in the operation and impairs a vested right. (Mo.) *Gladney v. Sydnor*, 517.

**4. HOMESTEADS.—Vested Rights in a Husband to Convey His Homestead** without his wife joining him is not in any way interfered with by the fact that she may at any time file her homestead claim, and thereby nullify his vested right to convey. The duration of such right in the husband is optional with his wife, but not with the legislature, and it cannot subsequently take it away. (Mo.) *Gladney v. Sydnor*, 517.

**5. HOMESTEAD—Alienation by Husband.**—A statute declaring that no alienation of his homestead by a married man shall be of any effect without the signature of his wife, does not preclude him from conveying an equitable right to the legal title to lands used as a homestead for himself and wife at the time of the conveyance, upon the extinguishment of the homestead right by her death or otherwise. (Wis.) *Jerdee v. Furbush*, 904.

See *Fraudulent Conveyances*.

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## HOMICIDE.

1. **MANS' LAUGHTER**—Definition.—Manslaughter is properly defined as a blow struck "out of a hot heart, heart full of passion, full of anger, and yet not full of sin," especially when the jury have been informed that a blow struck "out of a malicious heart, sinful heart" is murder. (S. C.) State v. Bowers, 795.

2. **MURDER—Blow with Fist**.—Murder may be committed by killing another by striking him a blow with his fist. (Mo.) State v. John, 513.

3. **MURDER—Blow with Fist—Intent**.—A man cannot approach an unoffending citizen, deal him a deadly blow with his fist in a vital part, and when his death ensues therefrom defend his act on the ground that he merely intended to punish and not to kill him. (Mo.) State v. John, 513.

4. **MURDER**.—Self-defense exists when one kills another of necessity. It exists when one finds himself in a position of imminent peril, either to himself or to another in peril of his life, or of serious bodily harm, and then strikes to save his life, or to save his body from serious harm, or to save the life of another, or to save the person of the latter from serious bodily harm. (S. C.) State v. Bowers, 795.

5. **MURDER—Bringing on Difficulty**.—If one person prepares with deliberation and brings on a difficulty with another, with the intention of killing the latter if he resents the insult, and he does,

resent and is killed by the former, the killing is murder. (S. C.) *State v. Cobb*, 801.

### HUSBAND AND WIFE.

1. **HUSBAND AND WIFE**—Trespass by Him on Her Lands.—A wife, though she has separated from her husband under the justifiable belief that he is living in adultery, cannot maintain a prosecution against him for trespass in entering upon and refusing to leave her lands, constituting her separate real property, though she has ordered him to leave and not to again enter. (N. C.) *State v. Jones*, 688.

2. **HUSBAND AND WIFE**—Married Woman's Torts.—If a wife commits a tort in the presence of her husband, it is presumed that she is coerced by him, and he alone is liable therefor, but if she acts deliberately, freely, and independently, it is their joint tort, and they are jointly liable. (S. C.) *Edwards v. Wessinger*, 789.

3. **A MARRIED WOMAN'S DEED** Containing a Covenant of Warranty, if not executed in conformity with the laws of the state wherein the land attempted to be conveyed is situated, cannot there operate by way of estoppel, so as to prevent her from claiming such land, though the conveyance was executed in the state wherein she resided and in accordance with its laws, and would have been valid had it related to her real property in that state. (N. C.) *Smith v. Ingram*, 680.

4. **THE CONVEYANCE of a Married Woman Cannot Operate Against Her by Way of Estoppel** where, because not executed in conformity with the statute, it cannot operate directly as a conveyance. (N. C.) *Smith v. Ingram*, 680.

5. **A MARRIED WOMAN** is not Estopped from Asserting the Invalidity of a Conveyance of her real property not executed in the mode required by statute, though she has received a valuable consideration and her vendee has been let into possession and has made valuable improvements. (N. C.) *Smith v. Ingram*, 680.

See Homesteads, 3-5.

### IMPAIRMENT OF OBLIGATION.

See Constitutional Law, 23-29.

### INFANTS.

See Intoxicating Liquors.

### INHERITANCE TAX.

See Taxation, 1.

### INJUNCTION.

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### INSPECTION OF SHEEP.

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## INSTRUCTIONS.

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## INSURANCE.

**1. INSURANCE—Paid-up Policy, Within What Time May be Demanded.**—If a life insurance policy provides that if a cause of forfeiture accrues after the policy has been in force for three years, the insurer will, on the surrender of the policy within six months after the lapse issue a nonparticipating paid-up policy for such sum as the legal net reserve at the time of the lapse will purchase as a single premium, the time specified within which the surrender may be made is not of the essence of the contract, and the insured is entitled to a paid-up policy, though he does not demand it for nearly five years. (Ky.) *Manhattan Life Ins. Co. v. Patterson*, 393.

**2. INSURANCE—Children, Who Participate in as.**—If a policy issues insuring the life of A. for the benefit of her children, all her children surviving her are entitled to participate in the benefit, whether born before or after the issuing of the policy. (N. Y.) *Seull v. Aetna Life Ins. Co.*, 615.

**3. INSURANCE.—The Burden of Proof to Establish that the Insured Died by Suicide is upon the insurer.** (Or.) *Cox v. Royal Tribe*, 752.

**4. INSURANCE.—The Presumption is that the Death of the Insured resulted from a natural cause.** (Or.) *Cox v. Royal Tribe*, 752.

**5. INSURANCE—Cause of Death, When a Question for the Jury.** Unless, upon the evidence, there could not reasonably be two opinions as to the cause of death, the question must be submitted to the jury. (Or.) *Cox v. Royal Tribe*, 752.

**6. INSURANCE—Suicide, Death by, When not Proved so as to Take the Question from the Jury.**—Evidence that the body of the deceased was found floating in an eddy of the river about a mile from the place of her residence; that she had been in ill-health, financially embarrassed and despondent, and had threatened to take her life, does not establish her suicide, so as to take the question from the jury, where there is doubt, from the evidence, whether her threat was seriously made, and there is testimony tending to show that she died from asphyxiation. (Or.) *Cox v. Royal Tribe*, 752.

**7. INSURANCE—Suicide--Instruction.**—In an action to recover on a policy of life insurance, an instruction that suicide is an affirmative defense; that the burden is upon the defendant to establish it by a preponderance of the testimony; that when a person is found dead from unexplainable causes, the presumption is that his death was natural or accidental, if nothing appears to the contrary; that self-destruction is contrary to the general conduct of mankind; that the plaintiff is entitled to recover, unless the evidence tends to overcome this presumption and satisfy the jury that the death was voluntary; that the presumption of law is, in the absence of any evidence as to the cause of death, that it happened from natural causes and did not arise from self-destruction; and that if in the case there is no proof as to the cause or manner of death of the insured, or the evidence as to whether her death was caused by accident or natural causes, and not by her own hands, is equally balanced, the jury should find in favor of the



presumption; that the presumption is disputable; and if from all the evidence, the jury finds the preponderance to be that she came to death by her own hands, they must find for the defendant, is not erroneous, and the use therein of the words "unexplainable" and "satisfied" is to define the presumption alluded to, and leaves the jury to say whether there was any proof as to the cause or manner of death. (Or.) *Cox v. Royal Tribe*, 752.

8. **CORONER'S INQUEST Attached to Proofs of Death.**—The record of a coroner's inquest attached to proofs of death made by the beneficiary or his agent in conformity to blanks furnished by the insurer, is admissible in evidence along with such proofs, upon the ground that it is an admission of the beneficiary against his interest as to the cause of death. (Or.) *Cox v. Royal Tribe*, 752.

9. **CORONER'S INQUEST.**—When Proofs of Death are Furnished by an Agent of the Insurer the record of a coroner's inquest is not admissible in evidence because it has been made a part of such proofs. Where, on the death of the insured, the lodge to which he belonged is required to notify the supreme executive council and to furnish proofs of death, proofs so furnished must be deemed to have been furnished by the agent of the insurer. (Or.) *Cox v. Royal Tribe*, 752.

10. **INSURANCE in Beneficial Association—Change in Beneficiary Where the Certificate is Withheld by Him.**—Though the by-laws of a mutual benefit association provide that a member may change the beneficiary named in a certificate by surrendering it and filling up a blank on the back of the certificate provided for the designation of a beneficiary, and that the secretary shall forward the certificate and application to the grand lodge, and that the supreme recorder shall issue a new certificate in accordance with the change designated, yet if the assured does all which it is possible for him to do, and the surrender of the certificate is prevented by its detention by the original beneficiary, a change of beneficiaries is thereby effected to the extent that if the money is paid into court, it should be awarded to the new beneficiary, as against the old one, who, by his refusal to surrender the certificate after being requested so to do, prevented the issuing of a new certificate as desired by the member. (N. Y.) *Lahey v. Lahey*, 554.

11. **INSURANCE—Construction of Policy.**—A clause in an insurance policy indemnifying the insured against loss resulting from the accidental discharge of an automatic fire extinguisher, which requires the insured to immediately notify the company of any known defect which shall render such extinguisher more than usually hazardous and cause such defect to be immediately repaired, has reference only to a defect in the extinguisher itself and not to any other contrivance in the establishment of the insured. (Mo.) *Wertheimer etc. Co. v. United States Casualty Co.*, 500.

12. **INSURANCE.**—Negligence of the insured, his agent, servant, or others, not amounting to fraud, though the direct cause of an accident and loss, is covered by, and does not defeat, a policy of insurance. (Mo.) *Wertheimer etc. Co. v. United States Casualty Co.*, 500.

13. **INSURANCE—Willful Act of Negligence.**—A negligent act of a servant in causing a loss, under an accident policy, of which the insured master knew nothing, cannot be imputed to the latter as his willful act of negligence. (Mo.) *Wertheimer etc. Co. v. United States Casualty Co.*, 500.

**14. INSURANCE—Preservation of Property.**—A provision in an accident insurance policy that it does not cover loss or damage caused by the neglect of the insured to use all reasonable means to save and preserve the property insured refers to the means, to be used after the accident causing the loss, to prevent greater loss than is necessary, but it does not refer to any act of negligence causing the accident and loss. (Mo.) Wertheimer etc. Co. v. United States Casualty Co., 500.

**15. NEGLIGENCE—Right of Assignee to Recover for.**—If a tenant, under the terms of a policy of insurance, on payment of his loss thereunder caused by the negligence of his landlord, assigns his claim to the insurer, the negligence of the latter in assuming the risk under the policy is no defense in an action by him against the landlord to recover for the latter's negligence. (Mich.) United States Casualty Co. v. Bagley, 424.

**16. INSURANCE—Construction of Policy.**—If any doubt exists as to the meaning of a clause in an accident insurance policy, it must be construed most favorably to the insured. (Mo.) Wertheimer etc. Co. v. United States Casualty Co., 500.

**17. INSURANCE AGAINST ACCIDENT—Voluntary Exposure to Unnecessary Danger—Knowledge of the Insured.**—To entitle an insurer to exemption from liability for the death of the insured, on the ground that he voluntarily exposed himself to unnecessary danger, it must appear that he knew of and realized the danger and with such knowledge, voluntarily exposed himself to it. (Ky.) Traveler's Ins. Co. v. Clark, 374.

**18. INSURANCE AGAINST ACCIDENT.—The Words "Voluntary Exposure to Unnecessary Danger,"** when employed in a contract of life and accident insurance, relate to dangers of a substantial character which the insured recognizes and to which he, nevertheless, consciously and purposely exposes himself, intending at the time to assume the risk of the danger. (Ky.) Traveler's Ins. Co. v. Clark, 374.

**19. INSURANCE AGAINST ACCIDENT.—Voluntary Exposure to Unnecessary Danger.**—One who lies down to sleep on the top of the boilers of a steamboat, and is there injured by steam escaping from a safety valve, is not guilty of voluntary exposure to unnecessary danger, though warned not to sleep there, unless he was conscious of the danger from the escaping steam from the safety valve. (Ky.) Traveler's Ins. Co. v. Clark, 374.

**20. INSURANCE AGAINST ACCIDENT—Death by Sunstroke.**—A death by sunstroke must be regarded as due to external, violent, and accidental means within the meaning of a policy of insurance, if it, while exempting the insurer from liability when death is caused by such means, specially provides that if an injury resulting in disability or death is caused by sunstroke, then the liability shall be one-fourth of the sum otherwise payable, unless the insured was acting in the line of his duty as a railway employé. (Ky.) Railway Officials etc. Assn. v. Johnson, 370.

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**INTEREST.**

See Usury.

**INTERNAL IMPROVEMENTS.**

See Constitutional Law, 30-32.

**INTERROGATORIES.**

See Trial.

**INTERSTATE COMMERCE.**

See Commerce.

**INTOXICATING LIQUORS.**

**INTOXICATING LIQUORS—Sale to Minor—Intent.**—If a statute prohibiting the sale of liquor to a minor without a written order does not make knowledge of the minority an ingredient of the offense, belief by the seller that the minor is of age does not constitute a defense. (Mich.) *People v. Curtis*, 404.

**JUDGMENTS.**

1. **JUDGMENTS—Final—Change of Attorneys.**—A judgment on a motion to change attorneys in a pending action is final, and an appeal may be taken therefrom. (Idaho) *Curtis v. Richards*, 134.

2. **JUDGMENTS.—Jurisdiction Existing**, any order or judgment is conclusive in respect of its own validity in a dispute concerning any right or title to be derived through, or anything done by virtue of, its authority. (Ind.) *Hart v. Smith*, 280.

3. **RES JUDICATA.**—Where the **Second Action Between the Same Parties is upon a Different Demand or Claim**, the judgment in the prior action operates as a bar or estoppel only as to those matters directly in issue, and not as to those collaterally litigated. (Or.) *La Follett v. Mitchell*, 780.

4. **RES JUDICATA.—Damages not Asserted.**—One who is sued for the breach of a contract is not compelled to assert a breach of such contract by his adversary, and to claim damages therefor, but may, on defeating the action, subsequently bring suit against the plaintiff in the former action to recover for a breach of the contract by the latter, occurring before the commencement of the first action. (Or.) *La Follett v. Mitchell*, 780.

5. **RES JUDICATA.**—Because in a **Prior Action a Different Question from that Actually Determined Might have Arisen and Been Litigated**, it cannot be claimed that such possible question is excluded from consideration in a second action between the same parties on a different demand. (Or.) *La Follett v. Mitchell*, 780.

6. **RES JUDICATA.—Inconsistency Between the Positions of a Party in Different Suits.**—That the position assumed by the plaintiff in a prior suit between him and the defendant is inconsistent with his position in the present action is not fatal to him, if the matter litigated in the first suit was different from that presented in the second, and the defendant in the second suit had not been misled

or injured by an inconsistent position of his adversary. (Or.) *La Follett v. Mitchell*, 780.

See Criminal Law.

#### JUDICIAL NOTICE.

See Evidence, 1, 2.

#### JURISDICTION.

See Criminal Law.

#### LANDLORD AND TENANT.

**1. LANDLORD AND TENANT—Use of Premises by Landlord.**—If a landlord occupies a portion of the leased premises himself he is not permitted to use such part in such manner as to injure his tenant. (Ind.) *Indianapolis Abattoir Co. v. Temperly*, 330.

**2. LANDLORD AND TENANT—Liability of Landlord for Gas Explosion.**—If a landlord rents a room in which he has gas pipes placed for his sole benefit and use in another part of the building occupied by himself, and has notice that gas is escaping from such pipes, his duty to prevent the escape of gas does not depend upon his superior knowledge, or means of knowledge, as to the condition of things in the tenant's room. Under such circumstances it is the duty of the landlord to take such measures to prevent injury to his tenant as a person of ordinary prudence, dealing with an agent as dangerous as gas, would adopt. (Ind.) *Indianapolis Abattoir Co. v. Temperly*, 330.

**3. LANDLORD AND TENANT—Liability of Landlord for Natural Gas Explosion.**—A landlord who occupies a portion of a building and pipes it for natural gas for his sole benefit, and not for the use of his tenant occupying other portions of the same building, is bound to use ordinary care to prevent the escape of gas, and knowing of the escape of gas through defective pipes, he is liable to the tenant who is without fault for any injury resulting to him therefrom. (Ind.) *Indianapolis Abattoir Co. v. Temperly*, 330.

**4. LANDLORD AND TENANT—Liability of Landlord for Gas Explosion—Pleading.**—If a tenant occupying part of a building is injured by an explosion of natural gas escaping from defective pipes placed in the building by the landlord for his sole use and benefit, and not for the use of the tenant, the doctrine of assumed risks, does not apply, and it is sufficient for the tenant to allege that the injury occurred to him without his contributory fault or negligence. (Ind.) *Indianapolis Abattoir Co. v. Temperly*, 330.

#### LEGACY.

See Wills.

Note.

**Legacies.** See Ademption of Legacies.

#### LEGISLATURE.

See Constitutional Law, 10-13.



**LICENSES.**

1. **CONSTITUTIONAL LAW—License for Employment Agency.** The section of the Illinois statute creating a free employment agency, which imposes a license fee upon private employment agencies conducted for hire, is unconstitutional when considered as a part of the whole statute. (Ill.) *Mathews v. People*, 241.

2. **LOANING MONEY Without Taking Out a License.**—If a statute requires, under a penalty, that persons engaged in loaning money shall pay a license tax, a failure to comply with the statute does not preclude the right to recover money loaned. (Idaho) *Vermont Loan etc. Co. v. Hoffman*, 186.

See *Municipal Corporations*, 15-20.

**LIENS.**

See *Constitutional Law*, 22; *Mechanics' Liens*.

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**LIFE ESTATES.**

1. **A LIFE TENANT Must Keep the Current Taxes Paid** if the estate is sufficient for that purpose. (Or.) *Abernethy v. Orton*, 774.

2. **LIFE TENANT, Remedy Against.**—Where a life tenant fails to pay the taxes, and another party is compelled to pay them to protect his interest, he has a remedy over against such tenant for the recovery of the amount paid. (Or.) *Abernethy v. Orton*, 774.

3. **LIFE TENANT Failing to Pay Taxes—Equity Jurisdiction.**—If a life tenant refuses to pay the current taxes, although the rent received by him is sufficient for that purpose, such refusal constitutes waste jeopardizing and tending to the destruction of the estate, and equity has jurisdiction for that reason over the subject matter, and may entertain a suit to compel such tenant to reimburse the remainderman for expenditures made in paying such taxes. (Or.) *Abernethy v. Orton*, 774.

**LIMITATION OF ACTIONS.**

1. **STATUTES OF LIMITATION Operate upon the Remedy** in the courts, but do not destroy the debt. (N. C.) *Menzel v. Hinton*, 647.

2. **LIMITATION OF ACTIONS—New Promise.**—Moral Obligation to pay a debt barred by limitation is a sufficient consideration for a new promise to pay it. (Mich.) *Koons v. Vauconsant*, 438.

3. **STATUTE OF LIMITATIONS—Estoppel to Plead.**—A defendant is not estopped to plead the statute of limitations, unless it can be fairly said that he is responsible for deceiving the plaintiff, and inducing him to postpone action upon some reasonably well-founded belief that his claim will be adjusted if he does not sue. (Mich.) *Klass v. City of Detroit*, 407.

See *Bills and Notes*, 8, 9; *Mortgages*, 8; *Municipal Corporations*, 21, 22; *Prescription*.

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#### MAJORITY OF ELECTORS.

See Constitutional Law, 1.

#### MANDAMUS.

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#### MANSLAUGHTER.

See Homicide.

#### MARRIAGE.

1. **MARRIAGE** is a Civil Contract, to the validity of which the free and full consent of the parties is essential. (N. Y.) *Di Lorenzo v. Di Lorenzo*, 609.

2. **MARRIAGE** is but a status created by a contract. (Utah) *Hilton v. Roylance*, 821.

3. **MARRIAGE** cannot be Dissolved by the Simple Consent or Agreement of the Parties.—It is regulated and controlled and can be dissolved only through the sovereign power of the state. (Utah) *Hilton v. Roylance*, 821.

4. **MARRIAGE**.—Consent to Marriage may be given orally or in writing, or may be inferred from the acts of the parties or the ceremony performed. No particular form of words is necessary. If in language mutually understood, or by acts declaratory of intention, the parties accept each other as husband and wife, their marriage is consummated. (Utah) *Hilton v. Roylance*, 821.

5. **MARRIAGE**.—A Ceremony is not Essential to a marriage in the absence of a statute requiring it. (Utah) *Hilton v. Roylance*, 821.

6. **A MARRIAGE** may be Implied by the Common Law where the parties cohabit for a considerable time and hold each other out as husband and wife. (Utah) *Hilton v. Roylance*, 821.

7. **MARRIAGE**.—Cohabitation is not Essential to a valid marriage. (Utah) *Hilton v. Roylance*, 821.

8. **MARRIAGE**.—A Secret Reservation of One of the Parties not Known to the Other cannot avoid or render invalid a marriage celebrated by a properly authorized ceremony apparently with the consent of both parties. (Utah) *Hilton v. Roylance*, 821.

9. **MARRIAGE**.—The Sealing Ceremony of the Mormon Church, entered into before a proper official between members of that church competent to contract marriage, constituted a valid marriage, though the woman was then supposed to be on her deathbed, and they never subsequently cohabited as husband and wife. (Utah) *Hilton v. Roylance*, 821.

10. **MARRIAGE**.—The Sealing Ceremony of the Mormon Church Effects a Marriage for time and eternity, and not for eternity only. The relation established by it is not one which may begin after death. (Utah) *Hilton v. Roylance*, 821.

11. **MARRIAGE**—Estoppel to Insist upon.—A woman who, mistakenly believing a Mormon Church divorce to be valid, contracts a second marriage, is not thereby estopped, on learning that her divorce is invalid, from asserting the first marriage and claiming her rights as the widow of her husband. (Utah) *Hilton v. Roylance*, 821.

12. **MARRIAGE**—Fraud Which Justifies Annulment of.—Under a statute authorizing a court to annul a marriage when the consent of one of the parties was obtained by force, duress, or fraud, a husband is entitled to a decree annulling a marriage to which he was induced to consent by the fraudulent misrepresentation of the woman that she had previously given birth to a child of which he was the father and which she exhibited to him, when in truth such child was not her offspring. (N. Y.) *Di Lorenzo v. Di Lorenzo*, 609.

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## MARRIED WOMEN.

See Husband and Wife.

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## MASTER AND SERVANT.

1. **MASTER AND SERVANT** are Jointly Liable as Joint Tortfeasors, for the tort of the servant committed within the scope of his employment and while in the master's service, whether the master is present or not. (S. C.) *Schumpert v. Southern Ry.*, 802.



**2. MASTER AND SERVANT.—An Employe Assumes the Risk** if, while unloading logs, he steps backward, to get out of their way as they roll from the car down a bank to the mill pond, falls in a hole which anyone could see, and is killed by the logs rolling over him. (Wis.) *McMillan v. Spider Lake etc. Co.*, 947.

**3. MASTER AND SERVANT—Assumption of Risk of Dangerous Appliances.**—If a master furnishes an employé with a machine which is not reasonably safe, and the latter accepts the employment with a full knowledge of the defect and danger, he voluntarily assumes the risk incident thereto, and, if injured, cannot recover from his employer. (N. Y.) *Rice v. Eureka Paper Co.*, 585.

**4. MASTER AND SERVANT—Assumption of Risks by Remaining in Service After a Promise to Repair or Remedy Defects.**—If a master furnishes a dangerous appliance with which his employé is to work, and the latter complains of a defect in the appliance, and a consequent danger to himself, and the master thereupon promises to repair, the former does not, by remaining in the service for reasonable time, assume the risks. On the contrary, the master takes upon himself the responsibility of any accident which may occur. (N. Y.) *Rice v. Eureka Paper Co.*, 585.

**5. MASTER AND SERVANT—Promise to Repair Within a Reasonable Time, What Construed to be a.**—If an employé complains that the condition of an appliance in use by him is dangerous, and declares that he will quit work unless the danger is removed, and is thereupon assured that the mill will be shut down for other repairs in the fore part of the following week, and that while it is thus shut down the danger will be removed, this assurance is not equivalent to a promise to repair at once, but is capable of a construction that it is to be fulfilled within a reasonable time, and the employé, by remaining in the employ until the following Wednesday, does not assume the risks of the danger, and is not precluded from recovering in case of his injury by the peril complained of. (N. Y.) *Rice v. Eureka Paper Co.*, 585.

See Constitutional Law, 13-17.

### MECHANICS' LIENS.

**1. MECHANICS' LIENS—Contract to Purchase—Failure of Contract.**—A mechanic's lien in favor of a person furnishing materials or performing labor for one in possession under an option or contract to purchase, to whom alone credit is given, cannot be enforced against the owner of the property after such person in possession has failed to fulfill his contract or to purchase the property. (Idaho) *Steel v. Argentine Min. Co.*, 144.

**2. MECHANICS' LIENS—Sufficiency of Notice.**—A statement in the notice of a mechanic's lien that the property upon which the labor was performed or materials furnished, "was the property of the defendant," is wholly insufficient as an allegation of ownership. (Idaho) *Steel v. Argentine Min. Co.*, 144.

**3. MECHANICS' LIENS on Distinct Branch of Property.**—A detached portion of a structure may be sold under execution to enforce a mechanic's lien. (Idaho) *Creer v. Cache Valley Canal Co.*, 63.

**4. MECHANICS' LIENS on Distinct Branch of Canal.**—A person constructing or performing labor in the construction of a distinct branch of a main canal under a contract with the owner is entitled to a lien on such branch for the amount due him for such labor. (Idaho) *Creer v. Cache Valley Canal Co.*, 63.

**MINES AND MINING.**

**MINES AND MINING—Location of Claim by Agent.**—The location of a mining claim for his principal may be made by an agent or attorney in fact, and every act necessary thereto, including the affidavit of location, may be made and performed by such agent or attorney, if the facts required are within his knowledge. (Idaho) *Dunlap v. Pattison*, 140.

See Constitutional Law, 17.

**MISREPRESENTATIONS.**

See Fraud.

**MORTGAGES.**

**1. CONVEYANCES—Acknowledgment, Form of.**—The certificate of the acknowledgment of a mortgage is sufficient if it shows the identity of the mortgagor and the fact of his acknowledgment. (Utah) *Deseret Nat. Bank v. Kidman*, 856.

**2. MORTGAGES—Gift of Interest.**—The acceptance by the mortgagee each year of a less amount than the interest due on the mortgage, and giving a receipt therefor stating that it was for interest in full for that year, shows an intention to give the remainder of the interest then due to the mortgagor, and constitutes a valid gift thereof. (Mich.) *Holmes v. Holmes*, 444.

**3. MORTGAGES.—Consideration.—Compounding Felony.**—A mortgage executed to prevent a prosecution for a felony is void for illegality of consideration, although there is in fact no felony to be compounded. (Mich.) *Koons v. Vauconsant*, 438.

**4. MORTGAGES—Reformation.**—If the consideration for a mortgage is much more than adequate, and the mortgagee is not shown to have understood that anything else was intended, except by silent acquiescence in the things done, the mortgage will not be reformed so as to make it more unfavorable to the mortgagee than it is by its terms. (Mich.) *Holmes v. Holmes*, 444.

**5. MORTGAGES—Parol Evidence to Vary.**—The plain terms of a mortgage, valid on its face, cannot be varied by proof of a parol agreement of a different tenor entered into by the parties at the time of the execution of the mortgage. (Mich.) *Holmes v. Holmes*, 444.

**6. MORTGAGE—Renewal of Note.**—If a mortgage is given to secure a debt, a change in the debt by the giving of a new note does not deprive the mortgagee of the benefit of his security. (Ky.) *Jarboe v. Shiveley*, 384.

**7. MORTGAGE WITH POWER OF SALE—Construction of Code Specifying Time for Foreclosure of.**—A provision of the code specifying the time within which an action may be commenced for the foreclosure of a mortgage or deed of trust for creditors, with a power of sale, does not fix or limit the time within which a mortgagee may exercise his power of sale. (N. C.) *Menzel v. Hinton*, 647.

**8. MORTGAGE WITH POWER OF SALE—Statute of Limitations.**—The power of sale given in a mortgage may be exercised after the debt secured thereby has been barred by the statute of limitations. (N. C.) *Menzel v. Hinton*, 647.

**9. THE PURPOSE of a Decree Foreclosing a Mortgage** is to conclude all parties to the record and bind them by the decree. It determines and declares priorities and preferences and marshals assets, and necessarily merges all liens involved in the decree, and thenceforth, if it is sought to subject the property to the payment of any of these distinct liens, it must be done under the decree in accordance with its directions, and by virtue of process provided for its enforcement. (Or.) *Williams v. Wilson*, 745.

**10. FORECLOSURE.—A Judgment Creditor Who is Made a Party to a Decree of Foreclosure** cannot afterward take out execution on his judgment and thereunder sell the property which was the subject of such decree, though after the sale under the decree the property was redeemed by a grantee of the mortgagor. (Or.) *Williams v. Wilson*, 745.

**11. AN INJUNCTION May Issue to Prevent a Judgment Creditor Who is a Party to the Decree of Foreclosure** which provided for the sale of the mortgaged premises and the application of the proceeds to the payment of the mortgage, and the satisfaction of such judgment, from taking out execution and selling the same property under his original judgment. His only remedy is under the decree. (Or.) *Williams v. Wilson*, 745.

See Chattel Mortgages; Tenancy in Common, 2.

Note.

**Mortgages, statutes of limitation against, renewals of the debt prevent the operation of**, 670.

statutes of limitation against the debt secured do not release, 664.

statutes of limitation against the secured debt bar suits to redeem from, 669.

statutes of limitation do not operate against while actions may be maintained on the debt secured, 669.

statutes of limitation, powers of sale may be exercised notwithstanding, 668.

statutes of limitation, revivor of after the debt secured by falls within, 670.

## MULTIPLICITY OF SUITS.

See Equity, 2.

## MUNICIPAL CORPORATIONS.

**1. MUNICIPAL CHARTER—Conflicting Provisions.—A provision of a city charter, creating the municipal corporation with general powers, including that of suing and being sued, is controlled and limited by a subsequent provision that upon certain classes of claims it shall be sued only on specified conditions and in a specified manner.** (Wis.) *Morrison v. City of Eau Claire*, 955.

**2. MUNICIPAL CORPORATIONS — Streets—Liability for Defects in.—While a city governing body may exercise its discretion in the selection of a plan of street improvements, if the plan adopted is unsafe for travelers, the municipality is liable, but when the plan is one that many prudent men might approve, or where it is so doubtful whether the one as planned by the city governing board is safe or dangerous that different minds may entertain different opinions with respect to it, the benefit of the doubt must**

be given to the city, and it exonerated from liability. (Ky.) *Teager v. City of Flemingsburg*, 400.

**3. MUNICIPAL CORPORATIONS—Streets with Uneven Grades.** A city is not bound to maintain an even or perfect grade in its streets and pavements. (Ky.) *Teager v. City of Flemingsburg*, 400.

**4. MUNICIPAL CORPORATIONS—Streets, Permit of Stepping-stones in.**—The construction of a sidewalk with a step which, from the nature of the grade, the municipal authority thinks proper, is not such negligence as will support a recovery against the city by one injured by stumbling on such step and falling. (Ky.) *Teager v. City of Flemingsburg*, 400.

**5. MUNICIPAL CORPORATIONS—Obstruction on Sidewalk.**—A city's failure to remove from a sidewalk a pile of rubbish, not placed there by its act or consent, is but an omission of its statutory duty to keep the highway reasonably safe for travel, and creates no common-law right of action, as for a nuisance, in favor of a traveler injured thereby. (Wis.) *Morrison v. City of Eau Claire*, 955.

**6. MUNICIPAL CORPORATIONS—Presentation of Claims.**—The procedure prescribed by a city charter for presenting claims against the city to the council, and appealing therefrom to the circuit court in case of disallowance, is essential to jurisdiction over the subject matter of any claim of the character required to be presented. (Wis.) *Morrison v. City of Eau Claire*, 955.

**7. MUNICIPAL CORPORATIONS—Presentation of Claims.**—In an action against a city for injuries sustained from a pile of rubbish on the sidewalk, a complaint which does not allege compliance by the plaintiff with the city charter in filing his claim and appealing from its disallowance to the circuit court, does not state facts sufficient to constitute a cause of action. (Wis.) *Morrison v. City of Eau Claire*, 955.

**8. MUNICIPAL CORPORATIONS—Presentation of Claims.**—A provision in a city charter excluding a claimant for damages caused by a defective street from original suit by ordinary procedure in the courts, and requiring him to reach such forum through the medium of presentation to the city council and appeal from its decision, hampered by various restrictions, including a bond for costs, is constitutional. (Wis.) *Morrison v. City of Eau Claire*, 955.

**9. MUNICIPAL CORPORATIONS—Presentation of Claims.**—A provision of a city charter requiring claims against the city to be presented to the council, and an appeal, in case of disallowance, to be taken to the circuit court, is not invalid as not providing a scheme of practice by which issue can be joined and trial of merits had. (Wis.) *Morrison v. City of Eau Claire*, 955.

**10. MUNICIPAL CORPORATIONS—Use of Sidewalks by Bicycles.**—City councils are empowered to regulate the conditions under which city sidewalks may be used by bicycles or to prohibit the use of the sidewalks by them entirely. (N. Dak.) *Gagnier v. City of Fargo*, 705.

**11. MUNICIPAL CORPORATIONS—Use of Sidewalks by Bicycles—Duty of City.**—A city fulfills its duty toward persons using the sidewalks therein for bicycle riding, when it keeps such sidewalks in a reasonably safe condition for travel thereon by pedestrians. (N. Dak.) *Gagnier v. City of Fargo*, 705.

**12. MUNICIPAL CORPORATIONS—Use of Streets by Bicycles—Duty of City.**—One injured while rightfully riding a bicycle on Am. St. Rep., Vol. 95—66



the sidewalk of a city street cannot recover against the city, if such sidewalk was in a reasonably safe condition for pedestrians, though it was not in a reasonably safe condition for bicycle riding. (N. Dak.) *Gagnier v. City of Fargo*, 705.

**13. MUNICIPAL CORPORATIONS—Use of Streets—Telephone Poles—New Servitude—Compensation.**—If the adjoining lot owner is the owner of the fee in the street to the center thereof, except as conveyed to the public for street purposes, the use of the street for telephone poles, even when authorized by the city authorities, is not a street use proper, but imposes a new burden or servitude thereon for which such lot owner is entitled to compensation. (N. Dak.) *Donovan v. Allert*, 720.

**14. MUNICIPAL CORPORATIONS—Use of Streets—New Servitude—Compensation—Injunction.**—If the abutting lot owner is entitled to compensation for the use of the street for telephone poles, he is entitled to an injunction to restrain the erection of such poles therein until compensation is made to him. (N. Dak.) *Donovan v. Allert*, 720.

**15. MUNICIPAL CORPORATIONS—Taxation of Vehicles—Licenses.**—A municipal ordinance imposing a tax for the use of the streets by vehicles is not a tax on such vehicles as property, but is in effect a tax for the privilege of using vehicles on the streets. (Ind.) *City of Terre Haute v. Kersey*, 298.

**16. MUNICIPAL CORPORATIONS—License of Vehicles—Police Power.**—A municipal ordinance licensing the use of vehicles upon the streets, which neither professes, nor is intended in any manner, to regulate or restrict the use of vehicles, its primary purpose being to impose a license tax as a revenue for the maintenance and repair of the streets, is not exercise of the police power. (Ind.) *City of Terre Haute v. Kersey*, 298.

**17. MUNICIPAL CORPORATIONS—Power to License Use of Vehicles for Revenue.**—The power of a city to impose and enforce a license tax on vehicles using the streets, for the purpose of revenue for the maintenance and repair of the streets, must be conferred by statute, and must be strictly construed. (Ind.) *City of Terre Haute v. Kersey*, 298.

**18. LICENSE ON VEHICLES—Constitutional Law.**—Constitutional provisions for a uniform and equal rate of assessment and taxation do not apply to, nor prohibit, a tax for a license to use vehicles on the street of a city. (Ind.) *City of Terre Haute v. Kersey*, 298.

**19. MUNICIPAL CORPORATIONS—Power to License Vehicles.**—Municipal corporations may be empowered by statute to impose a tax or license on vehicles used on the streets of a city, and when so empowered such license or tax may be imposed for the purpose of revenue for the maintenance and repair of such streets. (Ind.) *City of Terre Haute v. Kersey*, 298.

**20. MUNICIPAL CORPORATIONS—Vehicle Licenses.—Ordinances** imposing a tax for a license to use vehicles upon the streets may properly be based upon the use to which such vehicles are put, rather than upon their value. (Ind.) *City of Terre Haute v. Kersey*, 298.

**21. MUNICIPAL CORPORATIONS—Limitation of Actions.**—Municipal corporations, in all matters involving mere private rights, as contradistinguished from public rights, strictly so called, are subject to limitation laws to the same extent as private individuals, but on the other hand, in all matters involving strictly public

rights, they are not subject to the limitation laws as such. (Idaho) In re Counties Elmore etc. v. County of Alturas, 53.

**22. MUNICIPAL CORPORATIONS—Public Duty—Statute of Limitations.**—Upon the division of a county by statute containing a provision that boards of commissioners for the newly created counties shall apportion an existing debt and ascertain what portion thereof each county shall pay, the duty thus imposed is a perpetual continuing public duty incumbent upon the commissioners then in office and their successors against which the statute of limitations does not run, and the right to compel the performance of such duty by action does not abate by reason of the commissioners then holding office refusing or neglecting to perform such duty during their term. (Idaho) In re Counties Elmore etc. v. County of Alturas, 53.

See Contracts, 2.

Note.

**Municipal Corporations,** liability of boards of aldermen of for negligence and for nonperformance of official duties, 80, 83.

## MURDER.

See Homicide.

## NAVIGABLE WATERS.

**1. PUBLIC WATERS.—The Title to the Soil of Navigable Waters,** below high-water mark is in the sovereign, except so far as a citizen has acquired rights in it by grant, prescription, or usage; and this title, whether in the sovereign or the subject, is held subject to the public right of navigation and fishing. (Ill.) Cobb v. Commrs. of Lincoln Park, 258.

**2. PUBLIC WATERS—Submerged Land.**—The Legislature of Illinois is competent to grant the submerged lands of Lake Michigan to park commissioners for certain specific purposes. (Ill.) Cobb v. Commrs. of Lincoln Park, 258.

**3. PUBLIC WATERS—Wharves.**—The Owner of Submerged Lands has a right to say whether he will allow the owner of adjoining dry land to build out a wharf into the water on the soil of the former. (Ill.) Cobb v. Commrs. of Lincoln Park, 258.

**4. PUBLIC WATERS—Structures on Submerged Lands.**—A riparian owner has no right to build any structures on the submerged lands in front of his own land unless he owns such submerged lands or has a license to do so. (Ill.) Cobb v. Commrs. of Lincoln Park, 258.

**5. PUBLIC WATERS—Wharves.**—The Title of the Owner of Submerged Lands is not burdened with an easement in favor of the owner of adjoining upland to build wharves out to navigable water. (Ill.) Cobb v. Commrs. of Lincoln Park, 258.

**6. PUBLIC WATERS—Wharves, License from Secretary of War to Build.**—The right of the owner of upland to construct a wharf over the submerged land of his neighbor, without the latter's consent, cannot be acquired by obtaining a license from the secretary of war. (Ill.) Cobb v. Commrs. of Lincoln Park, 258.

## NEGLIGENCE.

**1. RECKLESS USE OF FIREARMS by Boys.**—If, after two boys have been alternately pointing an uncocked revolver at each other

in play, one points it at the other at full cock, and the latter strikes it up with his hand, when it is discharged, injuring him, the former is liable in damages, when he was violating the law forbidding minors to go armed with a revolver and forbidding anyone to point a gun or pistol at another. (Wis.) *Horton v. Wylie*, 953.

2. **NEGLIGENCE—Dangerous Premises —Trespassers.**—An electric light company maintaining its overhead and guy wires over the private premises of a railway company need not protect trespassers thereon, nor is it liable for injury to them caused by their coming in contact with a live guy wire. (Mich.) *McCaughna v. Owosso etc. Co.*, 441.

3. **NEGLIGENCE—Willful or Wanton Conduct.**—Whether a personal injury has been inflicted by willful or wanton conduct or gross negligence is a question of fact for the jury. (Ill.) *Illinois Central R. R. Co. v. Leiner*, 266.

4. **NEGLIGENCE—Willful or Wanton Act.—Gross Negligence**, to be equivalent to a willful or wanton act, is such negligence as to imply a disregard of consequences or a willingness to inflict injury. (Ill.) *Illinois Central R. R. Co. v. Leiner*, 266.

5. **NEGLIGENCE—Willful and Wanton Act.**—Ill-will is not a necessary element of willful and wanton negligence. (Ill.) *Illinois Central R. R. Co. v. Leiner*, 266.

6. **NEGLIGENCE—Question for Jury.**—The question whether the negligence alleged in the complaint caused the injury is properly left to the jury to determine under proper instructions. (S. C.) *Schumpert v. Southern Ry.*, 802.

See Carriers; Contracts, 2; Counties; Death; Insurance, 15; Landlord and Tenant.

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

## OFFICERS.

1. **OFFICERS—PUBLIC DUTY—Action to Enforce—Demand.**—If a municipal duty is of a strictly public nature required by law to be performed by a public officer, no demand for its performance is necessary before action brought to compel performance. The law itself is a continual demand, and neglect of performance a continual refusal. (Idaho) *In re Counties Elmore etc. v. County of Alturas*, 53.

2. **PUBLIC OFFICE—Waiver of Right to Contest Removal from.** If an officer is removed from his office and retired on a pension, he, by failing for more than three months to protest and by receiving his pension money, surrendering the paraphernalia of his office, seeking and receiving other employment, and by his silence when steps are taken to fill his place, waives his right to object to his removal and to prosecute proceedings for his reappointment. (N. Y.) *People v. Police Commrs.*, 596.

3. **PUBLIC OFFICE—Mandamus to Try Title.**—Mandamus is not a proper remedy to try title to a public office of which another is in possession under color of right. To this rule an exception cannot be admitted on the ground that there is no serious question as to title to the office. (N. Y.) *People v. Police Commrs.*, 596.

4. **MANDAMUS to Try Title to Office—Objections to, When not Waived.**—Where an application for a writ of mandate to compel

the applicant's reinstatement in an office from which he claims to have been illegally removed is made, and the incumbent of the office and others intervene, the intervention does not destroy their right to insist that the title to the office cannot be tried on mandamus. (N. Y.) *People v. Police Commrs.*, 596.

**5. OFFICIAL BONDS—Failure of Officer to Sign.**—The omission of an officer to sign his official bond does not release him or his sureties from any liability arising under the terms or conditions of his bond. Such bond is joint and several. (Idaho) *State v. McDonald*, 137.

**6. OFFICIAL BONDS.—Failure of a Surety on an Official Bond to Justify** does not release him from liability, if the bond is accepted without requiring him to justify. (Idaho) *State v. McDonald*, 137.

**7. OFFICIAL BONDS—Estoppel Against Surety.**—A surety on an official bond is estopped from denying any fact recited therein, when, by such denial, he seeks to avoid liability in an action between the parties to the bond. (Idaho) *State v. McDonald*, 137.

**8. OFFICIAL BONDS—Performance of Duties Secured.**—An official bond conditioned on the faithful discharge of all duties required of the sheriff by law, covers the discharge of his duties as license or tax collector, when, by law, it is his duty to collect and pay over county and state licenses. (Idaho) *State v. McDonald*, 137.

**9. OFFICIAL BONDS—Liability of Surety.**—If an official bond is joint and several, action may be maintained against all of the sureties jointly or against each severally. (Idaho) *State v. McDonald*, 137.

**10. OFFICIAL BONDS—Action on Pleading.**—In an action to recover on an official bond, it is not necessary to state in the complaint the several items of defalcation separately. (Idaho) *State v. McDonald*, 137.

See Attachment, 5, 6; Counties, 3; Public Officers.

## OSTEOPATHY.

See Physicians and Surgeons.

## PAROLE.

See Criminal Law, 5.

## PAROL EVIDENCE.

See Evidence, 6, 7.

Note.

Partition, restrictions in conveyances upon the right of, 218.

## PARTNERSHIP.

**1. A PARTNERSHIP as Such Cannot Take and Hold the Title to Real Estate.** (Or.) *Adams v. Church*, 740.

**2. A CONVEYANCE to a Partnership** passes the title to the individual members as tenants in common. (Or.) *Adams v. Church*, 740.

**3. PARTNERSHIP REALTY** is, in America, Partnership Property Only so far as it may be necessary for the payment of the



debts and the adjustment of the assets of the partnership. The legal title remains in the partners as tenants in common, and when no longer needed for partnership purposes, it is relieved from the trust growing out of the partnership relation. (Or.) *Adams v. Church*, 740.

4. **PARTNERSHIP—Evidence.**—If an attempt to establish a partnership wholly fails through lack of evidence, the court commits no error in holding as matter of law that no partnership exists. (Idaho) *Coffin v. Bradbury*, 37.

See Public Lands, 2, 3.

## **PASSENGERS.**

See Carriers.

## **PENSIONS.**

See Homestead, 12.

## **PERPETUITIES.**

See Deeds, 4.

## **PHYSICIANS AND SURGEONS.**

**OSTEOPATHY—Practice of Medicine.**—One who practices osteopathy and treats disease only by manipulation of the patient's limbs, muscles, ligaments and bones, does not practice medicine, nor is he required to obtain a license under a statute defining the practice of medicine as prescribing or directing for the use of any person any drug, medicine, appliance, or agency for the cure of disease or injury. (Miss.) *Hayden v. State*, 471.

## **PLEADING.**

1. **PLEADING—Contract.**—Under a complaint counting on a special contract, there can be no recovery on an implied contract. (Ind.) *Davis v. Chase*, 294.

2. **PLEADING—Collusion—Abatement.**—If cross-complainants are necessary or proper parties to the original action, the fact that they were made parties through collusion with the original plaintiff is no ground for abatement of the action. (Ind.) *Davis v. Chase*, 294.

3. **PLEADING—Motion to Make Definite.**—If a complaint alleges acts as being done both negligently and willfully, defendant's remedy is not by demurrer, but by motion to make more definite. (S. C.) *Schumpert v. Southern Ry.*, 802.

4. **PLEADING.—Acts of Negligence and Acts of Willful Tort.**—may be commingled in one statement as causing an injury, if such pleading is sanctioned by statute, and the adverse party cannot require a separate statement of such acts, nor an election upon which plaintiff will go to trial. (S. C.) *Schumpert v. Southern Ry.*, 802.

See Attachment, 5.

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**Pledges**, statutes of limitation against the principal debt do not release, 662.

**POLICE POWER.**

See Constitutional Law.

**PRESENCE OF ACCUSED.**

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title to real property may be created by, 672.

**PRESENTATION OF CLAIMS.**

See Constitutional Law, 29; Municipal Corporations, 6-9.

**PRINCIPAL AND AGENT.**

1. **PRINCIPAL AND AGENT.**—A Principal is not Answerable for the Unauthorized Fraud or Misrepresentation of his agent, on the ground that the principal might have profited by the wrongful and unauthorized act, where there is no evidence that he either adopted or profited by it. (N. Y.) *Taylor v. Commercial Bank*, 564.

2. **EVIDENCE.**—The Admissions or Declarations of an Agent are not evidence against his principal to establish the fact of his agency or the extent of his authority. (N. Y.) *Taylor v. Commercial Bank*, 564.

See Corporations, 13-15; Evidence, 3; Mines and Mining.

**PRINCIPAL AND SURETY.**

1. **SURETY** Signing a Bond on Condition that It Shall also be Signed by Another Specified Person.—If one signs a replevin bond and delivers it to a deputy sheriff on condition that he shall not return it until it is signed by one P., but the officer returns it to the court without P.'s signing, the surety is entitled, on a petition in equity, to have a cancellation of the bond decreed. (Ky.) *Smith v. Spragins*, 391.

2. **SURETY**—Mortgage to Secure is not Released by the Execution of a New Note.—If a mortgage is given to secure sureties, and

they and the principal are subsequently obliged to give a new note in renewal of the old one, the mortgage continues in force for the purpose of indemnifying them for payments which they may be compelled to make on the note of renewal. (Ky.) *Jarboe v. Shiveley*, 384.

See Attachment, 2, 3; Executors and Administrators, 2; Officers, 5-10; Recognizance.

### PRIVATE WAYS.

See Easements.

### PROBATE PROCEEDINGS.

See Executors and Administrators.

### PROCESS.

**PROCESS—Service of on Attendant in Court.**—A nonresident is not exempt from service of summons upon him in a civil suit against him while in attendance upon a court within the state as plaintiff in a suit therein. (Idaho) *Gynn v. McDanel*, 158.

See Appearance.

### PROPERTY.

**PROPERTY, What is.**—A Seat in a Stock Exchange is property, and passes to a receiver or assignee in bankruptcy. (N. Y.) *Matter of Hellman*, 582.

See Goodwill.

Note.

Prothonotaries. See Clerks of Court.

### PUBLIC LANDS.

1. **EXEMPTIONS—Timber Culture Claims.**—The provisions of the act of Congress declaring that no land acquired under the timber culture act shall become liable for the satisfaction of any debt contracted prior to the issuing of the final certificate therefor is valid, and absolutely prohibits the seizure of land for the satisfaction of a debt contracted by the donee prior to such issuing. (Or.) *Adams v. Church*, 740.

2. **EXEMPTIONS—Timber Culture Act—Partnership Liabilities.** A decree declaring that lands acquired under the timber culture act are partnership property does not remove the conditions annexed to the legal title, and if the property consists of lands acquired by one of the partners under the timber culture act, they remain, as before, exempt from execution for any debt created prior to the issuing of the final certificate, though it is the debt of such partnership. (Or.) *Adams v. Church*, 740.

3. **RES JUDICATA.**—A Decree Declaring that Certain Real Property is Held by One of the Partners for the Partnership and is Partnership Property does not establish that it is liable for partnership debts created prior to the issuing of the final certificate, where it is acquired under the timber culture act. (Or.) *Adams v. Church*, 740.

**PUBLIC OFFICERS.**

See Officers.

Note.

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**PUBLIC POLICY.**

**PUBLIC POLICY** is That Principle of Law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. (Ill.) Wakefield v. Van Tassell, 207.



**RAILROADS.**

**RAILROADS—Fellow-servants.**—A Conductor Riding Home on free transportation to visit his family over Sunday is not a fellow-servant with the employes operating the train. (Ill.) *Illinois Central R. R. Co. v. Leiner*, 266.

See Carriers.

**RECEIVERS.**

**1. FOREIGN RECEIVERS—Attachment of Property in Hands of.**—If a receiver has obtained rightful possession of personal property within the jurisdiction of his appointment, he cannot be deprived of its possession by attachment when he takes it in the performance of his duty into a foreign jurisdiction. While in such foreign jurisdiction it cannot be taken from his possession by resident or nonresident creditors of the insolvent debtor. (N. Dak.) *Woodhull v. Farmers' Trust Co.*, 712.

**2. FOREIGN RECEIVERS—Attachment.**—The property of a nonresident defendant cannot, while in the hands of a receiver appointed in another state, be seized under attachment, when brought within the state for a lawful purpose. (N. Dak.) *Woodhull v. Farmers' Trust Co.*, 712.

**3. FOREIGN RECEIVERS—Attachment.**—Property of a nonresident defendant is liable to seizure under attachment within the state prior to the appointment of a receiver therefor in another state or before such receiver takes actual possession of the property within his own state. (N. Dak.) *Woodhull v. Farmers' Trust Co.*, 712.

See Corporations, 6; Property.

**RECKLESS USE OF FIREARMS.**

See Negligence, 1.

**RECOGNIZANCE.**

**1. A RECOGNIZANCE** is an Obligation entered into before a court of record or magistrate, with a condition to do some particular act, as to keep the peace or appear and answer to a criminal accusation. (Ill.) *People v. Barrett*, 230.

**2. A RECOGNIZANCE** Differs from a Bail Bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation. (Ill.) *People v. Barrett*, 230.

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**REPLEVIN.**

**REPLEVIN—Answer—Bona Fide Purchaser.**—Where the defendant claims the right to hold the property as against a mortgage, on the ground that he is a purchaser in good faith, for value, and without notice, his answer must affirmatively allege these facts. (Utah) *Deseret Nat. Bank v. Kidman*, 856.

**REPRESENTATIVES IN LEGISLATURE.**

See Constitutional Law, 10-13.

**RES GESTAE.**

See Evidence, 4.

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**RES JUDICATA**

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**RETROSPECTIVE STATUTES.**

See Constitutional Law, 33-38; Homesteads, 3.

**SALES.**

1. **STATUTE OF FRAUDS.**—Receipt and Acceptance of property sold under an executory contract of sale, at any time after making the contract, takes it out of the statute of frauds. (Idaho) *Coffin v. Bradbury*, 37.

2. **STATUTE OF FRAUDS.**—If Questions of Delivery and Acceptance of goods sold to take the sale out of the operation of the statute of frauds are submitted to the jury under proper instructions, the verdict will not be disturbed when there is a conflict of evidence. (Idaho) *Coffin v. Bradbury*, 37.

3. **STATUTE OF FRAUDS—Delivery and Acceptance of Goods Sold.**—If, from the entire evidence, different minds might differ honestly as to the delivery and acceptance of goods sold to take the sale out of the statute of frauds, the question of such acceptance is one of fact for the jury, and their verdict thereon will not be disturbed. (Idaho) *Coffin v. Bradbury*, 37.

**SEALING CEREMONY.**

See Marriage, 9-11.

**SELF-DEFENSE.**

See Homicide, 4, 5.

**SENTENCE.**

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## STATUTE OF FRAUDS.

See Frauds, Statute of.

## STATUTE OF LIMITATIONS.

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## STATUTES.

1. **STATUTES.**—The Rule in Case of a Revision of Statutes is, that where the law as it previously stood was settled by adjudication or frequent application of the statute without question, a mere change in the phraseology is not to be construed as a change in the law, unless the purpose of the legislature to work a change is clear and obvious. (N. Y.) *Matter of Hellman*, 582.

2. **STATUTES.**—Repeal by Implication, in the absence of a clear intention, can be indulged only so far as unavoidable. (Wis.) *Morrison v. City of Eau Claire*, 955.

See Constitutional Law.



**STOCK EXCHANGE.**

See Property; Taxation, 1.

**STOCKHOLDERS.**

See Corporations.

**STREETS.**

See Municipal Corporations.

**STRIKES.**

See Constitutional Law, 14-17.

**SUICIDE.**

See Coroner's Inquest, 2; Insurance, 3-7.

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**Supervisors.** See Boards of Supervisors.

**SURETYSHIP.**

See Principal and Surety.

**TAXATION.**

1. **INHERITANCE TAXES**—Seat in a Stock Exchange.—Under a statute imposing transfer or inheritance taxes, and declaring that the words "estate or property" as used therein include all property or interest therein, whether situate within or without the state, a seat in the New York stock exchange of which the owner dies seised is subject to the inheritance or transfer tax. (N. Y.) Matter of Hellman, 582.

2. **TAXATION**—"Goodwill"—Constitutional Law.—The "goodwill" of a newspaper business is not of itself property within the meaning of a constitutional provision requiring the legislature to provide for a uniform system of taxation of all property with certain exceptions. (Ind.) Hart v. Smith, 280.

3. **TAXATION**—Goodwill of Business.—A general statute declaring that all property within the jurisdiction of the state, not expressly exempted, shall be subject to taxation, does not authorize the taxation of the goodwill of a newspaper business. (Ind.) Hart v. Smith, 280.

**4. TAXATION.—Goodwill of Newspaper.**—Conducted by individuals or copartnerships, is merely an incident of the business of a going concern, and as such business cannot be treated as a unit for the purposes of taxation, the goodwill thereof is not taxable. (Ind.) *Hart v. Smith*, 280.

**5. TAXATION of Shares of Stock.**—If without fraud the state board of tax commissioners has determined that shares of stock have a value for the purposes of taxation, the courts have no power to review such conclusion. (Ind.) *Hart v. Smith*, 280.

**6. TAXATION—Partly Legal and Partly Illegal.**—If an assessment made by tax commissioners is in part legal and in part illegal, and the legal portion cannot be ascertained, the whole tax must be held invalid. (Ind.) *Hart v. Smith*, 280.

**7. TAXATION—Injunction.**—Courts may relieve by injunction from assessments laid without jurisdiction (Ind.) *Hart v. Smith*, 280.

**8. TAXATION—Injunction—Collateral Attack.**—In a proceeding to enjoin tax commissioners from taxing the goodwill of a business, the rule requiring that the infirmity appear from the face of the record in a collateral attack does not apply. (Ind.) *Hart v. Smith*, 280.

See Life Estates; Municipal Corporations, 15-20; Waste.

#### TELEPHONE POLES.

See Municipal Corporations, 13, 14.

#### TENANCY IN COMMON.

**1. COTENANCY—Gift of Encumbrance.**—A gift may be made to one cotenant of an encumbrance upon the common property which will inure to his benefit alone. (Mich.) *Holmes v. Holmes*, 444.

**2. COTENANCY—Gift of Mortgage on Common Property.**—The fact that a mortgage makes a gift by assignment of the mortgage to one who is a cotenant with the mortgagors does not avoid the gift or prevent its enforcement by the assignee against his cotenants. (Mich.) *Holmes v. Holmes*, 444.

#### TICKETS.

See Carriers.

#### TIMBER CULTURE CLAIMS.

See Public Lands.

#### TORTS.

See Assault and Battery; Counties; Husband and Wife.

#### TRESPASS.

See Equity, 2; Negligence, 2.

#### TRIAL.

**1. TRIAL.—Special Interrogatories Should Call for a finding as to ultimate controlling facts, or as to probative facts from which the**

ultimate controlling facts necessarily result. (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

1a. **TRIAL—Special Interrogatories.**—It is **Competent for an Attorney** to read special interrogatories to the jury, to discuss the evidence applicable thereto, and to suggest the answers which, in his view, should be returned. (Ill.) *Chicago etc. R. R. Co. v. Gore*, 224.

2. **TRIAL.—Answer to Interrogatories** by the jury that there is no evidence of the facts so expected to be proved, is equivalent to a finding against the party propounding such interrogatories. (Ind.) *Indianapolis Abattoir Co. v. Temperly*, 330.

3. **JURY TRIAL.—An Instruction Which Merely Singles Out the Facts upon Which a Party Relies** to escape from liability is properly refused. (Ky.) *Traveler's Ins. Co. v. Clark*, 374.

4. **TRIAL—Instructions.**—The trial court is not bound to charge the jury in the exact words of the request, nor is it bound to charge a request covered by the general charge. (S. C.) *Edwards v. Wessinger*, 789.

See Criminal Law.

## TRUSTS.

1. **TRUSTS—When not Within the Statute of Frauds.**—A trust declared when the legal title is transmitted is not within the statute of frauds, and does not require a consideration to support it. (N. C.) *Sykes v. Boone*, 619.

2. **TRUSTS—Consideration, When not Essential to.**—An executed trust is good in favor of a volunteer. If declared at the time the legal title passes, it will be enforced, though without consideration. (N. C.) *Sykes v. Boone*, 619.

3. **TRUSTS—Parol to Convey Land to Another.**—If a conveyance is induced by the promise of the grantee that he will convey the property to a third person for a specified consideration if requested, this is a valid, enforceable declaration by the grantee that he holds the land on the trust to convey it on the condition specified. (N. C.) *Sykes v. Boone*, 619.

## UNDUE INFLUENCE.

**UNDUE INFLUENCE—Evidence of.**—Undue influence exercised upon a person in procuring an assignment of property rights cannot be inferred solely from the advanced age of the assignor. (Mich.) *Holmes v. Holmes*, 444.

## USURY.

1. **USURY—Compound Interest.—Coupon Notes** given for the interest of the principal debt which, by their terms, draw interest after maturity, contravene the statutes of Idaho forbidding compound interest, and are usurious, and only the principal can be recovered, without interest or costs. (Idaho) *Vermont Loan etc. Co. v. Hoffman*, 186.

2. **USURY.—A Foreign Corporation** engaged in loaning money in this state cannot avoid its usury laws simply by making the evidences of indebtedness payable in some state where the laws against usury are less onerous. (Idaho) *Vermont Loan etc. Co. v. Hoffman*, 186.

See Building and Loan Associations, 1.

**VENDOR AND VENDEE.**

**1. VENDOR AND VENDEE—Contract to Purchase—Death of Vendor—Interest of Heir—Execution.**—On the death of a vendor, his interest in land held by his vendee under a contract to purchase goes to his administrator as personalty, and cannot be sold under execution against his heir. (Mich.) *Bowen v. Lansing*, 427.

**2. VENDOR AND PURCHASER—Pleading Good Faith.**—A purchase of property in good faith and for value is not available as against a mortgage valid as against the mortgagor unless pleaded. (Utah) *Deseret Nat. Bank v. Kidman*, 856.

**3. VENDOR AND PURCHASER—Burden of Proof.**—One claiming an exemption from a mortgage on the ground that he was a purchaser in good faith, for value, and without notice thereof, must assume the burden of proof. (Utah) *Deseret Nat. Bank v. Kidman*, 856.

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**Vendor's Lien**, renewal of, purchase-money note preserves, 664.  
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**VESTED RIGHTS.**

See Constitutional Law, 33-38; Homesteads, 3, 4.

**WAGES.**

See Constitutional Law, 17.

**WAIVER.**

**RIGHTS—Power to Waive.**—A man may waive any right he has, whether secured by contract, conferred by statute, or guaranteed by the constitution. (N. Y.) *People v. Police Commissioners*, 596.

**WARRANTY.**

See Covenants; Husband and Wife, 3.

**WASTE.**

**WASTE.**—The Failure of a Life Tenant to Pay Taxes whereby the interest of a remainderman is in danger of being forfeited constitutes waste. (Or.) *Abernethy v. Orton*, 774.

**WATER COMPANY.**

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**WATERS AND WATERCOURSES.**

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## WILLS.

1. **DEVISE**—When to be Regarded as of the Proceeds of the Land and Not of the Land Itself.—A devise of land to an executor to be sold and the proceeds to be divided among specified bene-

ficiaries is not a devise of the land, but of the proceeds only. (Ky.) *Miller v. Malone*, 338.

**2. LEGACY OR DEVISE—Ademption of.**—If lands are devised to an executor, with a direction that he sell and divide the profits among certain legatees, and the lands are sold by the testator in his lifetime this does not operate as an ademption of the legacies, where, after such death, there is no difficulty in identifying the proceeds of the property or some part thereof. (Ky.) *Miller v. Malone*, 338.

**3. WILLS, REVIVAL OF.**—A Will Once Revoked, to be revived, must, notwithstanding the intention of the testator, either be re-executed or adopted by some subsequent writing executed as the statute prescribing the manner for the execution of wills requires. (Wis.) *In re Noon's Will*, 944.

**4. WILLS, REVIVAL OF.**—The Operation of a Revocatory Clause in a will is immediate and absolute, and the fact that such will is destroyed, or cannot be found after the death of the testator, does not revive the former one. (Wis.) *In re Noon's Will*, 944.

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